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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1964.

No. **296**

THE GOODYEAR TIRE & RUBBER COMPANY,  
*Petitioner,*

*v.*

FEDERAL TRADE COMMISSION,  
*Respondent.*

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**APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT.**

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Filed: October 23, 1959

## UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

IN THE MATTER

*of*THE GOODYEAR TIRE & RUBBER  
COMPANY,*and*THE ATLANTIC REFINING COMPANY,  
CORPORATIONS.

Docket No. 6486

## INITIAL DECISION

By EARL J. KOLB, Hearing Examiner.

[Appearances omitted]

This proceeding is based upon an amended complaint brought under Section 5 of the Federal Trade Commission Act, charging as unlawful certain contracts entered into between respondents The Goodyear Tire & Rubber Company, Inc., a wholly owned subsidiary of respondent The Goodyear Tire & Rubber Company and the Atlantic Refining Company, whereby The Goodyear Tire & Rubber Company, Inc., agreed to pay The Atlantic Refining Company a sales commission on all tires, batteries and accessories sold by said The Goodyear Tire & Rubber Company, Inc., to service stations and other outlets of The Atlantic Refining Company. The amended complaint further charged that respondent The Goodyear Tire & Rubber Company, Inc., had entered into similar contracts with certain



oil companies other than The Atlantic Refining Company, and that The Atlantic Refining Company had entered into a similar contract with The Firestone Tire & Rubber Company.

This proceeding is now before the hearing examiner for final consideration upon the amended complaint, answers thereto, testimony and other evidence, proposed findings of fact and conclusions filed by all parties and briefs in support thereof, and reply briefs. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by the parties, and their briefs in support thereof, and all findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith rejected, and the hearing examiner having considered the record herein, and being now duly advised in the premises, makes the following findings of fact, conclusions drawn therefrom and order:

1. Respondent The Goodyear Tire & Rubber Company is a corporation organized, existing and doing business under the laws of the State of Ohio with its principal office and place of business located at 1144 East Market Street, Akron, Ohio. The Goodyear Tire & Rubber Company is engaged in the manufacture and in the sale and distribution of rubber products including tires and inner tubes, directly and through several wholly owned and controlled subsidiaries, including The Goodyear Tire & Rubber Company, Inc., which is primarily a marketing subsidiary.

2. Respondent The Goodyear Tire & Rubber Company, Inc., (hereinafter sometimes referred to as "Goodyear") is a wholly owned subsidiary corporation of The Goodyear Tire & Rubber Company, organized under the laws of the State of Delaware with its office and principal place of business located at 1144 East Market Street, Akron, Ohio. The Goodyear Tire & Rubber Company, Inc., is engaged in the sale and distribution in interstate commerce of tires, inner tubes, batteries, automotive parts and accessories which are

known to the trade as TBA products and will be hereinafter so referred to.

3. Respondent The Atlantic Refining Company (hereinafter sometimes referred to as "Atlantic") is a corporation organized, existing and doing business under the laws of the State of Pennsylvania with its principal office and place of business located at 260 South Broad Street, Philadelphia, Pennsylvania. Said respondent is engaged in the production and in the sale and distribution in interstate commerce of petroleum products, including gasoline and lubricants sold to petroleum wholesalers (hereinafter referred to as "distributors") and to service stations.

4. Respondent Atlantic markets its petroleum products in the Middle Atlantic States (including parts of Ohio and West Virginia), New England (not including Maine) and the Southern Atlantic States. This marketing territory is divided into six marketing regions which are, in turn, subdivided into twenty-nine districts, consisting of a city or other marketing center and the surrounding territory. The marketing regions and districts are as follows:

Region	District
New England	Providence, R. I. Springfield, Mass. Hartford, Conn. Boston, Mass. New Haven, Conn.
New York	Syracuse, N. Y. Southern Tier, N. Y. Albany, N. Y. Rochester, N. Y. Watertown, N. Y. Buffalo, N. Y.
Philadelphia-New Jersey	Philadelphia-Suburban, Pa. South Jersey Newark (or North Jersey)
Eastern Pennsylvania	Reading, Pa. Allentown, Pa. Wilkes-Barre, Pa. Harrisburg, Pa. Williamsport, Pa. Wilmington, Del.

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Region	District
Western Pennsylvania	Pittsburgh, Pa. Altoona, Pa. Greensburg, Pa. Erie, Pa.
Southern	Charlotte, N. C. Baltimore, Md. Richmond, Va. Jacksonville, Fla. Miami, Fla.

5. As of April 30, 1956, there were approximately 394 salesmen calling on dealers and distributors of gasoline and lubricants, including service stations. These salesmen are divided into various classifications, dependent upon the functions which they perform as follows:

Type	Approximate Number	Function
Promotable dealer salesman	133	Sells Atlantic products and promotes recommended TBA to "promotable dealers", which term includes lessee dealers and contract dealers interested in complete service station operation.
Dealer salesman	25	Sells Atlantic products and promotes recommended TBA to dealers not covered by promotable dealer salesmen (usually in areas of sparse distribution) or to special groups such as car dealers in other areas.
General salesman	54	Sells Atlantic products and promotes recommended TBA to dealers not covered by promotable dealer salesmen or dealer salesmen, and also sells Atlantic products to smaller Commercial accounts.
Service salesman	147	Teaches dealers and their employees merchandising techniques and how to perform the services normally performed by first class service station operators. This teach-

Type	Approximate Number	Function
		ing involves both petroleum products and TBA. For teaching purposes the salesman uses the TBA on hand at the station.
Wholesale salesman	35	Sells Atlantic products and promotes recommended TBA to distributors and wholesale dealers.

6. All of respondent Atlantic's salesmen are paid on a salary basis. Promotable dealer salesmen also receive extra compensation based upon percentage gains in purchases of gasoline, motor oil and recommended TBA (and also for over-all gains) by those of their assigned dealers who have been in operation for a minimum of twelve months.

7. Respondent Atlantic sells its petroleum products to more than 5,500 retail dealers, a substantial number of whom operate service stations (as distinguished from grocery stores, garages, and other like outlets), and to more than 200 distributors who, in turn, sell said products to more than 2,800 retail outlets, a substantial number of whom operate service stations. These retail dealers and distributors are divided into the following classifications:

Present Designation	Percentage of Total Regional Gasoline Sales by Each Customer Class	
	1951 Percent	1955 Percent
1. Company-operated Station .....	1	0.1
2. Lessee Dealer .....	32	39.1
3. Contract Dealer .....	23	18.1
4. Commercial Account .....	15	16.6
5. Wholesale Dealer .....	3	1.1
6. Distributor .....	24	24.0
7. Jobber .....	2	1.0
TOTAL .....	100	100.0

8. The usual form of lease entered into by respondent Atlantic and its lessee dealers was for a term of one year, with automatic renewal from year to year unless written notice was given prior to the expiration of any term. Rental provided by any lease was usually a flat rental plus a cents-per-gallon charge, dependent upon location of station, financial condition of lessee and potential income. Such lease contained provisions relating to the use, maintenance and general appearance of the station. In the event of breach of any of the terms, conditions or covenants of the lease by the lessee, it was provided that Atlantic may, at its option, terminate the lease.

9. On April 1, 1953, respondent Atlantic adopted a long-term dealer lease policy under which any lessee dealer who has established a record of two years of satisfactory operation became eligible for a three-year lease with rental remaining the same during the entire period.

10. Tires, batteries and accessories have become a necessary and integral part of the business operation of the Atlantic dealer. He cannot profitably and successfully operate his business without the added revenue from that portion of his business which also enables the dealer to give complete service to his customers. The service station is important to TBA manufacturers as an outlet for distributing to customers. It is to the interest of The Atlantic Refining Company to have its dealers engaged in the sale of TBA as this builds a stronger dealer organization and increases the sale of gasoline.

11. Prior to March 1951 (except as to three districts in which the Sales Commission Plan was tested beginning in 1950) respondent Atlantic purchased TBA for resale either directly or indirectly to Atlantic dealers. This purchase for resale arrangement was first begun in 1932 when respondent Atlantic began the sale and distribution of tires manufactured by the Lee Rubber & Tire Corporation. In 1937 a contract was executed with the Electric Storage Bat-

tery Company for the purchase and resale of Exide batteries in the Philadelphia region which was expanded to all marketing regions in 1945. Accessory items were added from time to time, including DuPont polishes, Thermoid fan belts, American Chain and Cable Company's weed chains and Fram oil filters. Distribution of such products to Atlantic dealers and distributors was made by respondent Atlantic either directly or through about forty-five warehouses located throughout its marketing area or through Atlantic supply dealers who distributed such products to other Atlantic dealers.

12. During the period that respondent Atlantic continued on the purchase and resale plan, Atlantic service stations were identified as sellers of such sponsored TBA products as Lee tires and Exide batteries, and to some extent of other TBA handled.

13. In 1951 after a test of the Sales Commission Plan of Goodyear and Firestone in three districts, Atlantic adopted the complete Sales Commission Plan of these companies in all six of its marketing regions. Atlantic assigned the entire marketing area by allocating the New York, New England and Philadelphia-New Jersey regions to Goodyear and the three remaining regions to Firestone.

14. The sales commission agreement entered into between The Atlantic Refining Company and The Goodyear Tire & Rubber Company, effective March 1, 1951, provided for the payment of commissions to Atlantic on the sales by Goodyear of its tires, batteries and accessories to Atlantic outlets, including service stations, distributors and consignees. The consideration of this agreement was the services to be rendered by the Atlantic sales organization in promoting the sale of Goodyear TBA products as outlined in said agreement. This agreement provided, among other things, for the payment of a commission of 10 percent on all sales of TBA to Atlantic dealer outlets, and 7½ percent on all sales of TBA to Atlantic franchise petroleum



distributors. The Atlantic Refining Company also entered into a similar sales commission agreement with The Firestone Tire & Rubber Company, effective as of March 1, 1951.

15. The services which were performed by The Atlantic Refining Company pursuant to its contract with Goodyear and Firestone in promoting the sale of TBA products consisted principally of the following:

(a) Atlantic personnel, when interviewing prospective dealers for new or established service stations, advised them of the importance of TBA and recommended the TBA products of Goodyear or Firestone, and when dealers were selected would at times give advance notice of station openings or changes to Goodyear or Firestone and introduce the new dealers to the sales representative of Goodyear or Firestone, permitting such salesmen to complete any unfinished business with the outgoing dealer and enabling them to anticipate and to move promptly in handling the requirements of the new dealers.

(b) Atlantic gave assistance to dealers in arranging Goodyear or Firestone TBA supplies; took TBA orders from Atlantic dealers for either Goodyear or Firestone; and recommended the minimum Goodyear or Firestone inventory to be carried by the Atlantic dealer.

(c) Atlantic frequently conducted dealer meetings at which the sale of TBA was discussed, in some instances with the active participation of Goodyear or Firestone.

(d) Atlantic operated training schools for dealers and prospective dealers which included suggestions for displaying and merchandising TBA. In the discussion of TBA, Goodyear or Firestone products were used exclusively during the training school course.

(e) Atlantic incorporated suggestions on merchandising TBA in its dealer magazines and arranged for advertising and promotions, which included TBA products of Goodyear

or Firestone, and participated in promotions instituted by either Goodyear or Firestone.

(f) Atlantic also conducted tire clinics jointly with the personnel of Goodyear or Firestone which were important in familiarizing dealers in the care and repair of Goodyear or Firestone tires.

(g) Atlantic made TBA products available to credit card holders, including merchandise sold on deferred payments without carrying charge, which served to augment the sale of Goodyear or Firestone TBA.

16. The sales of Goodyear TBA and commissions paid thereon under the Atlantic-Goodyear Sales Commission Plan were substantial as is shown by the following tabulation:

	Total Sales	Total Commissions
1951.....	\$ 2,445,808	\$ 239,250
1952.....	4,175,890	411,743
1953.....	5,067,565	500,437
1954.....	5,284,743	523,048
1955.....	5,700,121	557,599
1/56-6/56.....	3,133,905	296,988
TOTAL .....	\$25,808,032	\$2,529,065

17. The substantiality of the sales and commissions under the Atlantic-Firestone TBA Sales Commission Plan is shown by the following tabulation for the years 1951 to 1956:

	Total Sales	Total Commissions
1951.....	\$ 3,243,350	\$ 299,524
1952.....	4,349,616	404,948
1953.....	5,050,381	469,784
1954.....	4,867,689	452,083
1955.....	5,562,936	506,199
1/56-6/56.....	2,545,798	234,317
TOTAL.....	\$25,619,770	\$2,366,855



18. Under date of March 1, 1951, Atlantic sent a form letter to all Atlantic dealers entitled "A Statement of Atlantic's TBA Policy". This letter announced the adoption of the TBA Sales Commission Plan and included therein the statement that "Your acceptance or rejection of the program is a matter of your own choice". Under date of August 28, 1962, respondent Atlantic addressed a similar form letter to all its dealers entitled, "A Restatement of Atlantic's TBA Policy". Under date of June 24, 1955, a similar letter entitled "No Forcing" was sent to all Atlantic dealers, and since that time has been given to new Atlantic dealers.

19. It is the contention of counsel supporting the complaint that because of the relationship, contractual and otherwise, between Atlantic and its station operators, consignees and distributors, the adoption of the Sales Commission Plan of selling and promoting the sale of TBA entered into by Atlantic with Goodyear and Firestone has a tendency to lessen, restrain, prevent or eliminate competition in the sale of TBA, and has deprived other suppliers of TBA of a substantial portion of the TBA business of the Atlantic petroleum outlets.

20. In support of the charges of the complaint, sixteen former Atlantic dealers were called to testify in this proceeding. With the exception of three of these dealers, they testified to various forms of coercion, adopted by Atlantic salesmen in an effort to induce them to purchase sponsored TBA. Some of these witnesses testified that they had received the so-called non-forcing letter, but that they were told by Atlantic salesmen that these letters were not controlling insofar as purchases of non-sponsored TBA was concerned. The testimony of the witnesses called to support the complaint pertaining to coercion is as follows:

(a) John Chambers, an Atlantic lessee from November 1952 to November 1954, purchased the bulk of his TBA from the Goodyear supplier. Atlantic salesmen were always

reminding him, that when his lease expired or was cancelled Atlantic would only accept sponsored merchandise, and that outside merchandise would not be accepted at all. This witness also testified that it was pointed out to him on a number of occasions that the acceptance or rejection of the Goodyear plan was up to the dealers.

(b) James Matthews, an Atlantic lessee from 1947 to 1957, was told at a meeting that dealers were free to buy wherever they saw fit, but whenever salesmen called they told him differently. At the time of the change-over from Lee to Goodyear, his Lee signs were removed from his station, and he was told to get rid of Lee tires and Auto-Lite batteries and handle Goodyear. Matthews testified that he discontinued the Lee tires because he did not want his lease-cancelled because of non-sponsored TBA. He was requested by Atlantic salesmen in 1953 to sign a mutual cancellation, but he promised to follow the line and went 100 percent with Goodyear. He took ten Auto-Lite batteries in trade, to which objection was made. Atlantic also objected to his handling DuPont anti-freeze. Matthews left the station in May 1957 due to bad health. He recalled receiving non-forcing letter dated March 1, 1951.

(c) Aniello L. Iacono, an Atlantic lessee from 1952 to 1954, had difficulty with Parris, the authorized TBA supplier, and began buying non-sponsored tires and batteries. He was asked by Atlantic salesmen to get rid of the tires and batteries and when he refused, the salesman made an inspection of his place and claimed he was using untrained personnel, improper uniform, improper display, and maintaining a dirty station. His lease was not renewed.

(d) Isidore Jack Pollock, an Atlantic lessee from 1940 to 1953, testified that Atlantic salesmen objected to his purchase of a number of Lee tires at a special price, however, the sales supervisor stated that this would be satisfactory because of the number of years that Pollock had been with Atlantic, and he continued to purchase Lee tires thereafter. He purchased some Bowers batteries, and salesmen told

him he was going to have his lease cancelled. Pollock left the station to take over a tavern.

(e) Francis J. Ballaron, an Atlantic lessee from 1953 to 1957, carried Goodyear tires and batteries purchased through Miller, an authorized distributor. He kept non-sponsored tires on oil rack where Atlantic would not see them. Ballaron testified that he left the station because of pressure every month for not buying TBA where he should.

(f) James M. Meyers, Jr., an Atlantic dealer from 1950 to 1951, testified that he discussed non-forcing letter with Atlantic salesmen who told him to try buying other merchandise and find out what the letter meant.

(g) Norris Stein, was an Atlantic lessee, beginning July 26, 1954. About six months later he discontinued exclusive purchase of Firestone and was told by Atlantic salesmen that he would not long be an Atlantic operator. He stated that he had received no-forcing letter of June 22, 1955. Terminated his lease for reasons not involving TBA.

(h) Thomas J. Sullivan, Jr., an Atlantic lessee from 1953 to 1954, was told that Atlantic would like him to obtain all his products from Firestone. He bought some Bowers batteries and also Exide and was told by Atlantic salesman not to sell the batteries as they were not as good as Firestone and that he didn't want them displayed in the station. He removed the batteries from display. Sullivan further testified that he returned the Exide batteries and discontinued the Bowers batteries as he felt that if he rubbed Atlantic the wrong way that he would be in their disfavor, and that his lease might not be renewed. He stated that the Atlantic representative made no direct threats, but always left the impression that if he did not operate the way Atlantic wanted him to, the chances were that his lease would not be renewed. The Atlantic salesman always questioned him when he bought non-sponsored items and gave him the impression that he was expected to buy Firestone products. The salesman would ask him from time to time why he did not buy Firestone, and he got to the point

where he bought all items from Firestone because he was afraid of no lease renewal. It was put to him that he would not be forced to buy Firestone products, but Atlantic more or less expected him to do so. Sullivan sent in cancellation of lease because of price controversy.

(i) John Galle, an Atlantic lessee from 1954 to 1956, discussed with Atlantic salesman an offer of batteries and tires at prices lower than Firestone, and salesman informed him that he had signed an agreement to purchase TBA from Firestone and should not go against this agreement, and in addition Atlantic would not like to see competitive brands to Firestone in the station. He did not purchase these items, but continued to purchase Firestone tires and batteries. He received the non-forcing letter on June 22, 1955, but did not discuss it with the Atlantic salesman.

(j) Harry N. Hawes, an Atlantic lessee beginning in 1945, had three stations. In the first station he bought only Firestone TBA. In the second station carried Lee tires, and Atlantic salesman wanted to know what they were doing there, but he continued to handle them. In the third station he sold only Lee tires and some accessories from Firestone without much comment from Atlantic. Lease was not renewed on the second station, and the third station lease was cancelled at his request. Atlantic salesman refused to let the new dealer take over the Lee tires and batteries on hand.

(k) Richard Brown, Atlantic lessee from October 1955 to April 1957, because of dissatisfaction with Firestone, began to purchase Goodrich tires. Atlantic salesman told him that he did not like the purchase of non-sponsored items, as it was affecting his salary.

(l) James Parag, an Atlantic lessee from August 1, 1955, to March 1956, became dissatisfied with Firestone and began purchasing Goodyear tires and accessories from different sources. When Atlantic salesman saw the merchandise on his shelves he told him that he could not handle them, that if he did not handle what Atlantic handled he would

Commission's Opinion  
UNITED STATES OF AMERICA,  
BEFORE  
FEDERAL TRADE COMMISSION.

Commissioners:

EARL W. KINTNER, Chairman,  
ROBERT T. SECREST,  
SIGURD ANDERSON,  
WILLIAM C. KERN.

IN THE MATTER

of

THE GOODYEAR TIRE & RUBBER  
COMPANY, a corporation, and  
THE ATLANTIC REFINING COMPANY,  
a corporation.

Docket 6486.

OPINION OF THE COMMISSION

By Kintner, Chairman:

This proceeding is based upon an amended complaint charging The Goodyear Tire & Rubber Company and its wholly owned selling subsidiary, The Goodyear Tire & Rubber Company, Inc., (hereinafter collectively referred to as "Goodyear") and The Atlantic Refining Company with acts, practices and agreements constituting a violation of Section 5 of the Federal Trade Commission Act. 15 U. S. C. §45 (1958). Respondents answered admitting in part the allegations of the complaint but denying that Section 5 had been contravened.

The principal issue framed by the pleadings is the legality of a contract between these respondents calling for the



lose his lease, and also because it also affected the salesman's commission.

(m) James R. Kelly, an Atlantic Lessee from September 1952 to March 1953, began with Firestone TBA. Later sold whatever tires customers wanted. Atlantic salesman would not let him change window valances, he was told to leave them alone to keep the station uniform. Had some Goodyear and Goodrich tires which he kept in the back room. He felt he would get in trouble if he did not.

21. Certain representatives of suppliers of TBA, who were selling in competition with respondent Goodyear, were called as witnesses in this proceeding. This testimony was taken in three areas—Philadelphia, Pennsylvania, Wilmington, Delaware, and Baltimore, Maryland. These parties testified generally that they had difficulty in selling TBA to Atlantic stations and testified specifically as to reasons given by certain Atlantic dealers for not buying or selling their TBA items. This testimony as to reasons given by Atlantic dealers for not purchasing competitive TBA was allowed under the authority of *Lawlor vs. Loewe*, 235 U. S. 522. This latter testimony was received not as proof of the truth of the facts recited, but for the purpose of showing the state of mind of the dealer. This testimony, however, is competent to show that dealers did not purchase a substantial amount of competitive non-sponsored TBA because of their feeling that they were required to purchase Goodyear or Firestone.

22. In the course of its defense in this proceeding, The Atlantic Refining Company introduced the testimony of thirty-six Atlantic dealers and two ex-dealers. Substantially all of these witnesses testified to selling non-sponsored TBA in varying amounts without objection by Atlantic. Most of them testified to having received the non-forcing letter issued by Atlantic similar to the letter of March 1, 1951, which this record shows was delivered to all its dealers and prospective dealers.

23. The hearing examiner recognized that present dealers appearing to testify were under considerable pressure because they were naturally interested in not jeopardizing the renewal of their leases. The record as a whole shows that there were no exclusive dealers in the sense that they confined themselves entirely to sponsored TBA, as all dealers carried some non-sponsored TBA to satisfy demands of their customers either in varying amounts or on a pick-up basis. Many of the stations do not have the space or finances to stock a complete line of tires and batteries, but instead purchase non-sponsored as well as sponsored items on a pick-up basis to satisfy customer demand. There was also in some instances evidence of confusion as to the definition of accessories among the dealers, as some included as accessories items generally considered as repair parts, as distinguished from accessories, and some dealers testified to carrying non-sponsored items which were, in fact, not supplied by Firestone or Goodyear. Many of the dealers called maintained a high sales volume in gasoline gallonage and also oil, and Atlantic would not jeopardize this gallonage by pressure tactics sufficient to irritate or alienate such dealers.

24. It is clear from the record in this proceeding that the Atlantic dealers did not consider the non-forcing letter as giving to them free and unhampered authority and the blessing of Atlantic to handle whatever TBA they might see fit. Both the dealers and the Atlantic salesmen accepted this letter for what it said; namely, that the dealer at the time of the change-over and prospective dealers thereafter had the right to select or reject the TBA sales program offered by Atlantic. The prospective dealer making application for an Atlantic station would not likely reject offhand the program submitted by Atlantic, and such rejection could very well affect his selection as an Atlantic dealer. After a dealer selected a TBA program, the Atlantic salesman insisted, and saw to it, that the dealer hewed to the line, insofar as the more important items of TBA were concerned. The salesman would be expected to insist upon the

purchase of sponsored TBA, as such purchases were reflected in the commission which the salesman received.

25. After giving consideration to the testimony of the various witnesses appearing in this proceeding, and giving consideration to their demeanor and credibility, it is the opinion of the hearing examiner that the record in this proceeding as a whole indicates that coercion and pressure were used on a substantial number of dealers to induce them to purchase sponsored TBA and to discontinue the purchase or display of non-sponsored items.

### CONCLUSIONS

1. The complaint does not charge, nor does the evidence introduced in this proceeding prove, the existence of a conspiracy between Goodyear and Atlantic to restrict and restrain competition in the sale and distribution of TBA products.

2. There is no evidence that The Goodyear Tire & Rubber Company, or The Goodyear Tire & Rubber Company, Inc., engaged in, or participated in, any of acts or practices designed to force dealers and distributors of The Atlantic Refining Company to purchase Goodyear TBA products.

3. Neither the sales commission contract between Atlantic and Goodyear nor the contracts between Atlantic and its dealers and distributors contain any clause or provision requiring such dealers or distributors to purchase only Goodyear TBA.

4. In making a determination as to whether leases made by Atlantic with its dealers are used to suppress competition, the extent to which they are in conformity with reasonable requirements in the field of commerce in which they are used will have a direct bearing on their legality. The house-keeping provisions of the leases are not unreasonable or oppressive, and the renewal and cancellation provisions of



the leases are in conformity with those which ordinarily appear in many leases of property.

5. The consideration for the payment of commission to Atlantic under the sales commission contract is based upon substantial services rendered by Atlantic in promoting the sale of Goodyear TBA to Atlantic dealers and distributors.

6. No inference or implication can be drawn from the contractual relationship between Atlantic and its dealers, that the degree of control by Atlantic over its dealers is sufficient to force its dealers to purchase only sponsored TBA.

7. The evidence in this proceeding shows that leases have, on occasion, been cancelled because of TBA practices involving the purchase or display of non-sponsored TBA products.

8. It is further concluded that for the purpose of inducing the purchase of sponsored TBA by Atlantic dealers, Atlantic representatives did, in fact, coerce, and attempt to coerce, and force Atlantic dealers to purchase substantial quantities of Goodyear and Firestone TBA, and Atlantic accepted the benefits of such acts and practices. These acts of coercion consisted of demands that dealers discontinue the purchasing and displaying of non-sponsored TBA under threat of lease cancellation, non-renewal of lease or other corrective action. Such coercion need not be 100 percent effective in order to constitute an unfair method of competition or unfair act or practice in violation of the Federal Trade Commission Act.

9. The charges of the complaint are sufficiently broad to sustain an order prohibiting overt acts of coercion even though it be found that the contracts entered into by the parties are not illegal.

10. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named herein.

11. The acts and practices of The Atlantic Refining Company, as herein found, which involve coercion of its dealers are all to the prejudice of the public and have a tendency and capacity to restrict, restrain or lessen competition in the sale of TBA products and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

### ORDER

IT IS ORDERED that respondent The Atlantic Refining Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the promotion, offering for sale, sale and distribution of tires, inner tubes, batteries and other automotive parts, accessories and supplies (hereinafter referred to as "TBA products"), in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly

1. Inducing, or attempting to induce, the purchase of TBA products of a particular supplier by Atlantic dealers by threatening to cancel or to not renew lease of dealer or to take other retaliatory action if said products are not purchased.
2. Threatening the cancellation or non-renewal of any contract or lease if the dealer purchases or continues to purchase TBA products not sponsored, recommended or approved by the respondent, or the sale of which is not promoted by the respondent.
3. Threatening the cancellation or non-renewal of any contract or lease if the dealer displays or con-

tinues to display TBA products not sponsored, recommended or approved by the respondent, or the sale of which is not promoted by the respondent.

4. The performance of any acts of intimidation or coercion, either through statements, oral or written, made directly to dealers or by representatives of respondent, which are designed to, or have, the purpose or effect of intimidating or coercing respondent's dealers or other customers to purchase TBA products sold by any designated supplier sponsored, recommended or approved by respondent.
5. Compelling, or attempting to compel, dealers by any means or method to sell and distribute only products supplied by a designated supplier sponsored, recommended or approved by respondent.
6. Preventing, or attempting to prevent its dealers, by means of threats, intimidation or coercion, from handling or displaying TBA or other similar products which the respondent does not sponsor, recommend or approve, or the sale of which is not promoted by the respondent.

IT IS FURTHER ORDERED that the complaint be, and it is hereby, dismissed as to respondents The Goodyear Tire & Rubber Company and The Goodyear Tire & Rubber Company, Inc.

/s/ EARL J. KOLB,  
Hearing Examiner.

October 23, 1959.

**APPENDIX B.**

**OPINION AND ORDER OF THE COMMISSION.**

~~The Opinion begins at page B-1.~~

The Order begins at page B-67.

payment by Goodyear of a sales commission to Atlantic in return for sales assistance in promoting automotive tires, batteries, and accessories (hereinafter referred to as "TBA" or "TBA products") of Goodyear to retail and wholesale petroleum outlets of Atlantic. In addition, Atlantic is charged with having entered into a substantially identical agreement with The Firestone Tire & Rubber Company, and Goodyear is charged with having entered into such agreements with a number of oil companies other than Atlantic, including Shell Oil Company.<sup>1</sup> Although Atlantic and Goodyear are the only respondents in the instant case, Shell and Firestone are joined as respondents in a companion case, Docket 6487, and in another companion case, Docket 6485, The Texas Company and The B. F. Goodrich Company are paired as respondents.

The complaint charges, in substance, that the success enjoyed by Goodyear and Firestone in selling to Atlantic outlets has been purchased at the expense of competing TBA suppliers at the manufacturing and wholesale levels. Counsel supporting the complaint contend that the Atlantic-Goodyear and Atlantic-Firestone sales commission contracts are unlawful because, *in conjunction with Atlantic's economic power over its ostensibly independent wholesale and retail petroleum outlets*, these contracts operate to stifle the free choice of Atlantic's retail and wholesale dealers insofar as their TBA purchases are concerned. Among the unlawful competitive effects stemming from Atlantic's sales commission contracts charged by the complaint are these: (1) That suppliers of TBA competing with Goodyear and Firestone at the wholesale level have been foreclosed from access to Atlantic's retail outlets on the same competitive terms as have been made available to Goodyear and Firestone; (2) That competing manufacturers of tires and

<sup>1</sup> Other oil companies having sales commission arrangements with Goodyear include Anderson-Pritchard Oil Corp., Ashland Oil and Refining Co., The Carter Oil Co., D-X Sunray Oil Co., Quaker State Refining Co., Richfield Oil Co. (accessories only), The Shamrock Oil and Gas Corp., Shell Oil Co., and Sinclair Refining Co. (accessories only).

other TBA items have been foreclosed from access to Atlantic's wholesale distributors on the same competitive terms as have been made available to Goodyear and Firestone; (3) That competition between Goodyear and Firestone in selling to wholesale and retail outlets of Atlantic has been destroyed; (4) That a substantial number of Atlantic's petroleum distributors and service station operators have been denied their right to act as independent businessmen in exercising freedom of choice as to TBA products which they may purchase and stock for resale; and (5) That the consuming public has been deprived of the benefits of free competition at the wholesale and retail levels insofar as TBA distribution through service station outlets under the sales commission plan is concerned.

Respondents deny these allegations and assert that their sales commission contract is a legitimate and competitive method of distributing TBA which benefits suppliers of TBA products, oil companies, dealers and distributors of petroleum products and the consuming public.

After hearings extending from the latter part of 1956 into November 1958, the hearing examiner filed his initial decision on October 23, 1959, dismissing the complaint as to Goodyear but holding that Atlantic, by forcing a substantial number of its dealers to purchase sponsored TBA through threats of lease cancellation or other retaliatory action, has engaged in unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. He further held that the charges of the complaint are sufficiently broad to sustain an order prohibiting overt acts of coercion on the part of Atlantic even though the sales commission contracts themselves are not illegal. An order was entered against Atlantic prohibiting future acts of coercion or intimidation designed to force Atlantic dealers to purchase TBA products sponsored by Atlantic.

Both sides have appealed from the initial decision. Counsel supporting the complaint contend that, while the order entered by the hearing examiner is well supported by the evidence of record, it will not be an effective means of



remedying the unlawful effects on competition caused by the sales commission plan. They seek an order restraining respondents from continuing with their present sales commission agreement and enjoining them from entering into similar agreements in the future. They also contend that Atlantic should be enjoined from purchasing TBA products from any manufacturer or other vendor of such products for resale to any wholesalers or retailers of Atlantic petroleum products, "... or for distribution in any other manner, directly or indirectly, to any of the aforesaid wholesalers or retailers of Atlantic petroleum products."

Reply briefs were filed by Atlantic and Goodyear to the appeal brief of counsel supporting the complaint, and by counsel supporting the complaint to the appeal brief of Atlantic. Oral argument was heard by the Commission on June 23, 1960, and the matter is now before the Commission for decision. We find that Atlantic has in fact coerced a substantial number of its dealers to purchase substantial amounts of sponsored TBA through threats of lease cancellation or other retaliatory action. We further find that Atlantic has sufficient economic power over its wholesale and retail distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics. For reasons set forth hereinafter, we conclude that the exercise of this power by Atlantic through the use of the sales commission plan in favor of Goodyear constitutes an unfair method of competition and an unfair act or practice in commerce within the meaning of Section 5 of the Federal Trade Commission Act.

#### CHARACTERISTICS OF THE SALES COMMISSION PLAN

Motorists may purchase replacement TBA items from several major classes of distributors. Manufacturers of these items, for example, Goodyear and Firestone, maintain either company-owned or franchised wholesale and retail distribution outlets in all of the marketing areas for TBA products considered in the course of the hearings in this case. Gasoline service stations constitute a second major

class of outlets for TBA products. According to a 1947 market survey relied upon by Goodyear in implementing its sales commission program with The Shamrock Oil and Gas Corporation of Amarillo, Texas, motorists purchase approximately 37 percent of their replacement tires and tubes, 44 percent of their replacement batteries, and 20 percent of their automotive accessories from gasoline service stations.<sup>2</sup>

The complaint in this case alleges that "service stations by the nature of their business, are particularly well adapted to be outlets for the sale of TBA products to the motorist consumer. They constitute a large and increasingly important market for TBA products." The truth of this allegation is conceded by both Goodyear and Atlantic, and Goodyear also admits that it "... sells TBA products directly and through wholesalers to many customers, including service stations who purchase for resale to consumers for replacement use in their automobiles."

Service station operators may purchase their requirements of TBA from two principal sources: (1) Local wholesale TBA dealers, representing Firestone, or Goodyear, or some other TBA manufacturer; or (2) Oil companies chiefly engaged in refining and distributing petroleum products which also purchase TBA products from manufacturers of these items, for resale along with the refinery products such oil companies distribute through their respective marketing organizations. TBA purchased by oil companies for resale may either be branded with a particular oil company's principal brand, for example, "Gulf," or with a private brand controlled by an oil company but used exclusively for TBA and not for refinery products, for example "Atlas," or with the supplying manufacturer's own brand, for example, "Lee" (tires) or "Exide" (batteries).

<sup>2</sup> Atlantic estimated in 1948 that approximately 21 percent of all replacement passenger tires are sold by service stations. Although Atlantic's estimate is considerably lower than Goodyear's, it is nevertheless clear that service stations account for a substantial percentage of total TBA replacement items sold to motorists.



No particular term is used in the industry to describe the marketing technique whereby service station operators purchase TBA from independent local wholesalers, but the term "purchase-resale" is customarily used to characterize the marketing technique whereby oil companies purchase and resell TBA to their respective service station dealers. The sales commission method of distributing TBA is a hybrid deriving certain of its attributes from the first and other attributes from the second of these marketing techniques. Both the purchase-resale plan and the sales commission plan make use of the marketing facilities of marketing oil companies, but in different ways and with differing competitive effects. This may be illustrated by contrasting the purchase-resale method of distributing TBA used by Atlantic prior to 1951 with the sales commission method adopted by Atlantic in 1951 and used by the company since that time.

*Atlantic's Purchase and Resale Plan.* Sometime in 1932, Atlantic commenced to purchase "Lee" tires from the Lee Rubber and Tire Corporation and to resell such tires to its wholesale and retail petroleum distributors. Later, in 1937, Atlantic commenced to purchase "Exide" batteries from the Electric Storage Battery Company (hereinafter referred to as "Exide") and resell such batteries, along with "Lee" tires, to Atlantic dealers. Thereafter, Atlantic began to purchase and resell the following automotive accessories:

Products	Supplier
DuPont polishes and chemicals	E. I. du Pont de Nemours and Company Wilmington, Delaware
Thermoid fan belts and radiator hose	Thermoid Corporation Trenton, New Jersey
Fram oil filters	Fram Corporation Providence, Rhode Island
Schrader valves	A. Schrader Sons Brooklyn, New York

**Products**  
Weed chains

**Supplier**  
American Chain and Cable  
Company  
York, Pennsylvania

Among the duties undertaken by Atlantic in connection with this program were the purchasing, financing, shipping, warehousing and selling of TBA items to its various classes of retail and wholesale petroleum dealers. Commenting on his company's TBA program in 1950, Mr. S. J. Heideman, TBA Manager for Atlantic, commented that "We receive a good gross margin in keeping with the duties left to us. . . ." Moreover, the overall satisfaction of Atlantic's dealers with the Lee-Exide arrangement was evidenced by the results of a TBA brand preference survey undertaken by Atlantic's Sales Research Section in 1948 and 1949. More than 1,000 service station dealers representing seven major oil companies, including Atlantic, located in 47 cities from Massachusetts to Florida were interviewed during the course of this survey. Of the Atlantic dealers interviewed, 67 percent preferred Lee tires and 79 percent preferred Exide batteries over competing brands of tires and batteries. Eleven percent of Atlantic's dealers stated a preference for Goodyear tires, 4 percent for Firestone tires, and the remainder announced a preference for various other tire brands. No preference for any particular brands of accessory items was found to exist, although "A definitely unsatisfactory supplier-dealer relationship" on accessories was observed. Sixty-seven percent of the Atlantic dealers contacted indicated that they would rather obtain their TBA requirements from several sources rather than a single source, the principal reasons given therefor being price advantages and the variety of brands. Of the remaining 33 percent of Atlantic dealers, who preferred a single source of supply for TBA products, less than 4 percent gave as a reason the fact that the single supplier could provide them with a complete line of TBA—better service was given as a reason by 35 percent of the Atlantic dealers.

preferring a single source of supply, and price was given as a reason by an additional 32 percent.

### *Atlantic's Changeover to the Sales Commission Plan*

Contemporaneously with the TBA brand preference survey of service station dealers described above, Atlantic management was actively considering possible alternatives to their purchase-resale arrangement with Lee. On January 19, 1948, exploratory letters were sent to five major tire manufacturers, The Goodyear Tire & Rubber Company, United States Rubber Company, The B. F. Goodrich Company, The Firestone Tire & Rubber Company, and General Tire & Rubber Company, inquiring "... what interest you may have in the sale of your tires and tubes through ATLANTIC outlets." The tire companies were informed of Atlantic's desire "... to consider your propositions on first line, second line, and private brand, or as many of these lines as you merchandise."

To assist the tire companies in preparing their quotations, Atlantic estimated it would require approximately 300,000 passenger tires and 40,000 truck tires annually, with tube requirements approximating 70 percent of tire requirements. Proposals were requested not only as to principal brands of the tire companies ("Goodyear," "Firestone," etc.) but also as to secondary brands controlled by these companies ("Kelly-Springfield," "Fisk," "Federal," "Miller" and "Hood") and as to private brands as well. Mansfield Tire and Rubber Company and Lee were also contacted and requested to submit proposals on a private brand tire.

A detailed analysis of responses received from the various tire companies was presented to Mr. D. T. Colley, Vice President in Charge of Domestic Sales of Atlantic, in a memorandum of June 22, 1948, from the company's TBA Manager, Mr. Heideman. This memorandum concluded with the statement:

"This presentation and Atlantic's benefits with the several companies has been discussed at length with

the members of the T. B. A. Products Committee. It was their unanimous opinion that Lee appeared to be the best choice for our company. To their approval, I would like to add my own, since it is my opinion after careful analysis that the Lee franchise is the best available at the present time for Atlantic."

In a subsequent memorandum of August 24, 1948, Mr. Heideman set forth several reasons why a proposed experiment then under consideration involving the sale of Firestone tires in one sales district of Atlantic should *not* be adopted:

"It is apparent . . . that it would be unreasonable to expect too great an expansion of our present sales by the addition of a better known tire. As a matter of fact, it is our opinion that there is a very real possibility of a smaller market with Firestone due to their presently established company stores and distributors. Volume purchase requirements would leave a great number of our dealers in a poor competitive position.

"... neither Firestone batteries nor accessories have the national acceptance of the lines we presently handle . . . [T]here is certainly an indication that consumer acceptance of the Firestone brand in batteries is very limited."

Nevertheless, negotiations with the tire companies continued throughout the remainder of 1948, and in May 1949, Goodyear expressed its willingness to offer a TBA program to Atlantic. However, it was Firestone which was selected for Atlantic's first experiment with the sales commission plan. In a letter of January 10, 1950, to the Regional Manager of its New York Region, an Atlantic official explained:

"As you know, for the past year we have been studying T. B. A. as to its profitability to the Company. Our most recent findings indicate that it is

questionable whether this venture is paying us to the degree that the effort expended warrants.

"In our approaches to the subject, we have had discussions with various major tire manufacturers who, as you know, are interested in handling the entire T. B. A. line, paying us a commission.

"The proposition that seems most acceptable to us is one offered by Firestone. I will not attempt to go into detail covering this proposition, but when you come to Philadelphia for the Regional Manager's Meeting next week, Mr. Heidemann (sic) plans to sit down with you and go over the proposition with the thought in mind that you will elect to have your Region be the guinea-pig."

As it turned out, however, the Firestone plan was not introduced into the New York area. Instead, operations under the Firestone commission plan began in Atlantic's Erie, Pennsylvania, district on March 30, 1950, and in the Wilmington, Delaware, district on April 4, 1950. Operations under a sales commission plan with Goodyear commenced on an experimental basis in Atlantic's Newark, New Jersey, sales district on June 12, 1950. After these programs were instituted, Atlantic's Sales Research Section conducted a secret poll in July and August, 1950 among 600 of the 750 Atlantic dealers and distributors in the three TBA test districts. The purpose of this poll was to determine the preference of Atlantic dealers as between the Lee-Exide program and the sales commission program. Of the 123 dealers responding to the poll, 45 percent preferred the new sales commission plan, 40 percent preferred the former Lee-Exide arrangement, and 15 percent showed no preference for either plan.

In December, 1950, Atlantic contacted seven manufacturers of batteries, including Exide and Gould-National Batteries, Inc., "... in an attempt to discover whether they had at present or contemplated in the future a battery



program for direct dealer merchandising similar to the commission plan offered by certain tire companies." This suggests that Atlantic was considering limiting the sales commission contracts with Firestone and Goodyear to tires and tubes only, or perhaps to tires, tubes and automotive accessories only, with a separate sales commission arrangement for batteries with a supplier who could furnish a more widely-known battery than the "Firestone" and "Goodyear" brands. (Actually, Goodyear does not manufacture batteries, but instead purchases batteries marked with the "Goodyear" label from Electric Auto-Lite Company and Gould-National Batteries, Inc.)

Favorable replies were received from several of the battery manufacturers, with Exide showing particular interest in such a program. This company's manager for automotive replacement sales responded to the Atlantic inquiry on December 22, 1950:

"Currently all Exide automotive replacement battery sales to dealers are made through our Wholesale Distributors, thus affording prompt delivery through many warehouses.

"Your letter of December 15 inquires as to our plans for a commission arrangement to be offered national oil accounts on direct sales to dealers. We believe that our experience with this type of operation in past years should be of great value to you. Therefore, I suggest that immediately after the first of January you arrange for a meeting with interested members of your organization for a complete discussion of the many phases of this subject."

Negotiations between Atlantic and Exide were never consummated, however, and on February 14, 1951 a sales official of Exide reported to his superior as follows:

"Mr. S. J. Heidman (sic), T. B. A. manager of the Atlantic Refining Company called today to give me advance confidential information regarding a decision made this morning by top management of

the Atlantic Refining Company regarding future handling of T. B. A. sales to Atlantic dealers.

"Effective as quickly as the changeover can be made, all T. B. A. sales to Atlantic dealers will be handled on a commission arrangement.

"... Both Firestone and Goodyear had previously been approached regarding a plan whereby they would sell tires only to the Atlantic Refining Company accounts on a commission arrangement and had flatly refused such a plan insisting that either the complete program or none be sold by them."

TBA Manager Heideman submitted a memorandum entitled "T. B. A. Conversion to Firestone & Goodyear Programs" to Vice President Colley of Atlantic on March 21, 1951, summarizing the changeover to the sales commission program:

"On February 14th, the decision was made to swing over to the Commission Plan of T. B. A. marketing effective March 1st. It was arranged for three regions (Philadelphia-New Jersey, New England and New York) to market the program of the Goodyear Tire and Rubber Company, and the other three (Eastern Pennsylvania, Western Pennsylvania, and the South) were to market the program of the Firestone Tire and Rubber Company. *The split was largely a matter of regional selection, decided upon by local advantages enjoyed by the respective rubber companies but influenced by staff determinations to have the two rubber companies competing in different localities for an equal share in the development of the Atlantic dealer's T. B. A. business.* Although this move was sudden, events leading up to it were developed in an orderly fashion over a period of years.

"It will be interesting to review some of the advantages that we enjoy under the Commission Plan. We are relieved of the purchasing function . . . We do not warehouse or deliver any merchandise; we are not involved in the handling of accounts, such as invoicing or credit and collection work; we do not issue catalogs or price books nor do we have to provide point-of-sale promotional helps. All of these responsibilities as well as sales training help are assumed by the rubber manufacturers. We assist in the selling job as well as in the dealer training and merchandising task, and for this effort receive a commission which varies according to class account and type of merchandise, but has been averaging well over 9%.

"... We are indeed fortunate in having these two companies competing against one another for a more secure or favorable position with Atlantic. We stand to gain from this arrangement whether we are in a buyer's or seller's market.

"We have tried to estimate how our 1950 actual experience on T. B. A. would have compared with the same volume of performance if it were accomplished under the Commission Plan. Our T. B. A. volume *excluding the three test districts* amounted to seven and a half million dollars. Our gross profit ranging from 20 to 30% on the different products amounted to approximately \$1,664,000. Estimated expenses chargeable to this operation total \$2,071,000. This would indicate a loss of about \$407,000." (emphasis added)

<sup>3</sup> Whether Atlantic's purchase-resale program was as unprofitable in reality as appeared from the accounting procedures used by the oil company was questioned in a memorandum from the sales manager of Exide to the vice-president of this company in February, 1951:

"The accounting procedure set up by the Atlantic Refining Company was such that expenses charged against T. B. A. sales appeared to make this operation unprofitable.



MAP I, below, shows the manner in which Atlantic's marketing area was finally divided between Goodyear and Firestone. Although the three regions assigned to Firestone constitute a much greater geographical area than do the regions assigned to Goodyear, the TBA sales volume by the two rubber companies to Atlantic dealers and distributors within their respective assigned areas has generally been very nearly the same in every year since 1951, as indicated by TABLE I, below. This table shows that during the first 6 years of Atlantic's operation under the sales commission plan, Firestone's sales volume to Atlantic accounts totalled \$26,078,095 and exceeded the sales volume of Goodyear by only \$105,000.

**TABLE I**  
**TBA Sales Volume by Firestone and Goodyear to Atlantic**  
**Accounts, and Commissions Paid Thereon, June, 1950**  
**Through June, 1956**

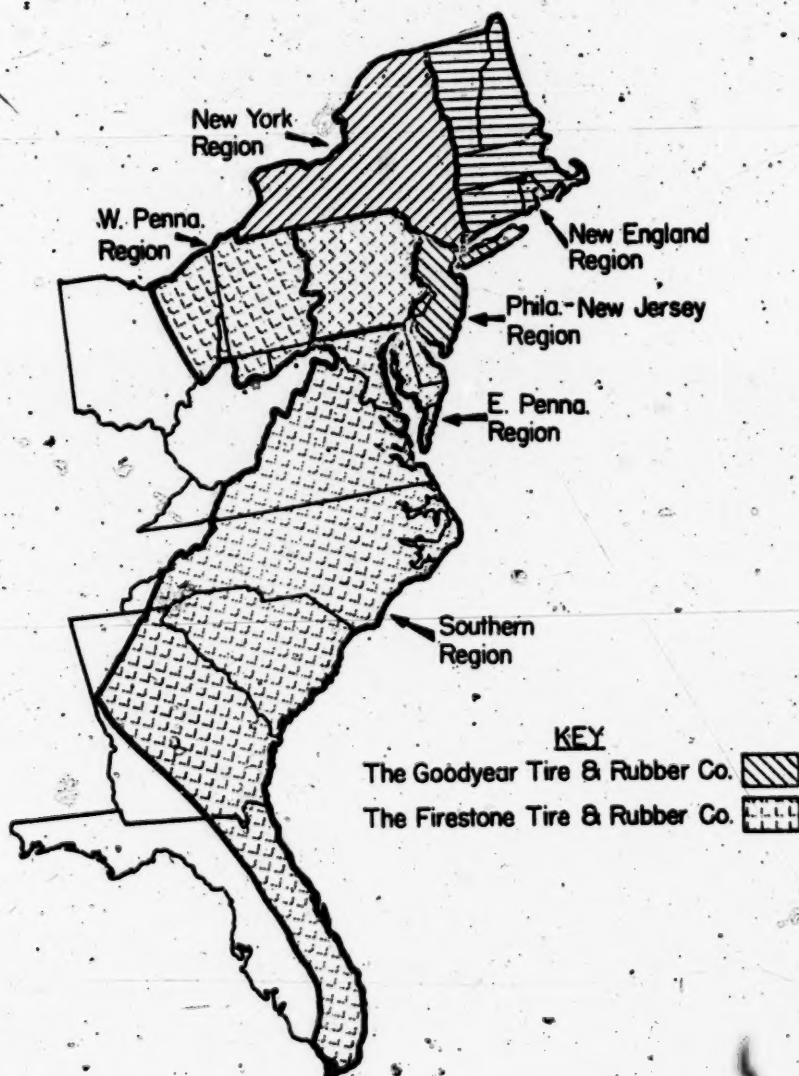
	Goodyear Sales Volume	Firestone Sales Volume	Goodyear Commissions	Firestone Commissions
6-50/12-50.....	\$ 165,578	\$ 458,325 <sup>1</sup>	\$ 15,447	\$ 43,894 <sup>1</sup>
1951.....	2,445,808	3,243,350	239,250	299,524
1952.....	4,175,890	4,349,616	411,743	404,948
1953.....	5,067,565	5,050,381	500,437	469,784
1954.....	5,284,743	4,867,689	523,048	452,083
1955.....	5,700,121	5,562,936	557,599	506,199
1-56/6-56.....	3,133,905	2,545,798	296,988	234,317
Total.....	\$25,973,610	\$26,078,095	\$2,544,512	\$2,410,749

As a result of this and because the top management of the Atlantic Refining Company believed that their own men should participate only in the sales of petroleum products, it was decided early in 1950 to try out the Firestone and Goodyear sales commission plan . . . .

<sup>1</sup> Includes period from April, 1950 through December, 1950.

NOTE: In 1950, the sales commission plan was used in only 3 of Atlantic's 34 sales districts. The sales commission plan was not introduced in all 34 Atlantic sales districts until March 1, 1951.

**MAP I**  
**THE ATLANTIC REFINING CO.**  
**DIVISION OF MARKETING REGIONS**  
**BY TBA SALES COMMISSION PLANS.**  
**EFFECTIVE MARCH 1, 1951**



In 1952, the first full year in which the sales commission plan was operative in all Atlantic sales districts, combined sales of Goodyear and Firestone TBA to Atlantic dealers and distributors amounted to \$8,525,506, and the two rubber companies paid a total of \$816,691 in sales commissions to Atlantic. The success with which Atlantic transferred its own former TBA sales volume under the purchase-resale plan to Goodyear and Firestone under the sales commission plan may be gauged from the fact that Atlantic's TBA sales volume in 1949, the last full year of operation under the purchase-resale plan, amounted to \$6,697,471. In 1950 Atlantic continued the purchase-resale plan in all except 3 of its 29 sales districts, and in that year the oil company's TBA sales volume was \$7,581,760.

The sales gains accruing to Goodyear and Firestone as a consequence of their sales commission contracts with Atlantic were accompanied by a corresponding loss in sales by Lee and Exide even though both companies made vigorous efforts to retain the business of Atlantic dealers and distributors after Atlantic switched to the sales commission plan. Lee opened new factory branches in Hartford, Connecticut; Providence, Rhode Island; and Syracuse, New York for this specific purpose. All branches of Exide were instructed to make it "their number one job" to solicit the business of Atlantic dealers and distributors. Nevertheless, within nine months after Atlantic began sponsoring Goodyear TBA on March 1, 1951, Lee concluded that "approximately 25% of the Atlantic Refining Company business will be salvaged this year." Seven months after the changeover, Exide found that it had retained all or part of the business of 22.5 percent of the better Atlantic accounts and all or part of the business of 24.7 percent of the total number of Atlantic accounts. Thus, some 75 percent of Lee-Exide sales to Atlantic distributors and dealers were lost within a nine-month period in 1951, even though a market survey conducted by the Atlantic Sales Research Section in 1949 had shown that 67 percent of Atlantic dealers and distributors preferred Lee tires and 79 percent preferred Exide batteries.

Lee's Vice President in Charge of Sales, Mr. W. F. Hinderscheid, complained bitterly to Atlantic about the wholesale replacement of Lee advertising signs at Atlantic stations with Goodyear advertising signs shortly after the sales commission plan was undertaken on a test basis by Atlantic in 1950:

"I was under the impression, also, where dealers wanted to continue to handle Lee Tires through us it would be allright for them to do so and we could still have our identification on those locations, however, I find that even though the dealers continue to handle our tires their stations are identified with competitive signs. For instance, in the Newark District our identification is being taken down and Goodyear will be erected even though the dealer still wants to handle Lee Tires."

TBA sales by Firestone and Goodyear to Atlantic outlets continued to grow, and by 1955, the last full year for which data are available, combined sales of the two rubber companies under their sales commission contracts with Atlantic amounted to \$11,263,057. In order fully to understand the devastating competitive effects on manufacturers and wholesalers of TBA products competing with Firestone and Goodyear which have resulted from the latter two companies' sales commission contracts with Atlantic, however, some further understanding of the functioning of the sales commission system is necessary.

#### *Mechanics of the Sales Commission System*

Goodyear and Firestone maintain either company-owned or franchised wholesale outlets in most of the principal cities and in many smaller communities throughout the entire marketing area of Atlantic Refining Company. Atlantic markets its petroleum products in the Middle Atlantic States (including parts of Ohio and West Virginia), New England (not including Maine) and the Southern Atlantic States. As has been shown, this market-

ing territory is subdivided into six sales regions, three of which have been assigned to Goodyear and three to Firestone. (See MAP I, supra.)

In cities and towns where Atlantic retail stations are located, such stations are assigned to a local Goodyear distributor (if in Atlantic's New England, New York or Philadelphia-New Jersey sales regions) or to a local Firestone distributor (if in Atlantic's Eastern Pennsylvania, Western Pennsylvania or Southern sales regions). The assigned TBA distributor is intended to be the supply point from which the Atlantic dealer will purchase a substantial percentage of his requirements of TBA.

The vast majority of Atlantic's retail service stations are operated by independent businessmen who either own or lease their stations. These dealers not only buy and sell Atlantic petroleum products, but also offer TBA at their stations, and in addition perform various automotive services and repairs. Atlantic maintains sales offices throughout its marketing area and employs salesmen whose duty it is to solicit orders for Atlantic petroleum products from Atlantic dealers, and to perform other functions for the oil company in its dealings with its service station operators.

When orders for petroleum products are obtained, the salesmen cause such products to be delivered to the Atlantic dealers, who pay for them at time of delivery or at other specified times. The same Atlantic salesmen also act as sales agents for Goodyear or Firestone, soliciting TBA orders from Atlantic dealers, frequently accompanied on their rounds by salesmen employed by either the local Goodyear or Firestone distributors. If TBA orders are obtained, such orders are turned in to the appropriate TBA suppliers—the local distributors of either Goodyear or Firestone—who deliver the merchandise and are paid by the Atlantic dealers. The TBA suppliers, in turn, make reports of such sales to the District Sales Offices of their respective companies, either Goodyear or Firestone.

Under the terms of the sales contracts between Goodyear and Atlantic and Firestone and Atlantic, Atlantic is



entitled to a commission amounting to 10 percent of the net sales value of all sponsored (i.e., Goodyear or Firestone) merchandise sold by Atlantic retail dealers, as consideration for the assistance given by the Atlantic sales organization in obtaining TBA orders from Atlantic dealers.<sup>4</sup> These payments are made by Goodyear and Firestone directly to Atlantic each month. Atlantic incurs no expense in connection with the purchasing, financing or warehousing of the TBA so supplied and has received sales commissions from Goodyear and Firestone over the years equivalent to more than 9 percent of the net sales value of all TBA products sold by these rubber companies to Atlantic dealers and distributors.<sup>5</sup>

Tires and tubes comprise the most important of the three components of the TBA line, accounting for about 70

<sup>4</sup> Atlantic has some 236 wholesale distributors, and is entitled to a commission of 7½ percent on purchases of sponsored TBA by these jobbers, compared with 10 percent on purchases by Atlantic's retail dealers.

<sup>5</sup> Goodyear's reasons for entering into its sales commission agreement with Atlantic were set forth in a "Confidential" memorandum of February, 1951, written by Mr. S. A. Gaylord, Goodyear's Manager of Sales to oil company outlets:

"... As you know we have recognized the desirability of Atlantic distribution for many years and the need for more oil company distribution in the new territory now assigned to us, which represents more than 50% of the Atlantic T. B. A. sales and potential.

"Early last year when supplies were plentiful and signs for the future pointed to over-production and increased competition, we mutually agreed on the marketing experiment with Atlantic in our respective Newark District territories with a commitment for expanded territory if the Goodyear Commission Plan proved successful—which it did.

"It is true that even at a late date we could have withdrawn from our commitment to Atlantic; however, we would have been out of the account for keeps and our competition [Firestone], which placed no restrictions on moving in, would have the account 100 percent.

"... The decision of our Management was made after consideration of all factors and particularly because it gave Goodyear the opportunity of entering into a long-term relationship with Atlantic providing our performance is satisfactory."



percent of total TBA sales to Atlantic outlets, with batteries and accessories representing about 15 percent each. Goodyear produces its own tires and tubes, and the more important categories of automotive accessories, including tire retread and repair materials, fan belts and radiator hose. Batteries marked with the "Goodyear" label are purchased for resale from Electric Auto-Lite Company and Gould-National Batteries, Inc., while the following accessories are purchased by Goodyear for resale under the original manufacturer's own brands:

Accessory	Brand	Manufacturer
Spark Plugs	AC	AC Spark Plug Div. General Motors Corp.
Oil Filters	AC	Same as above
Oil Filters	Purolator	Purolator Products, Inc.
Cleaners, Polishes and Waxes	du Pont	E. I. du Pont de Nemours & Co., Inc.
Cleaners, Polishes	Johnson	S. C. Johnson & Son, Inc.
Cleaners, Polishes and Waxes	Simoniz	Simoniz Company
Cleaners, Polishes and Waxes	Mae's	Mae's Super Gloss, Inc.
Radiator Chemicals	du Pont	E. I. du Pont de Nemours & Co., Inc.
Radiator Chemicals	Warner	Warner-Patterson Co.
Auto Lamps and Bulbs	Westinghouse	Lamp Division, Westinghouse Electric Corp.
Wiper Blades	Anco	The Anderson Company

The sales commission method of distributing TBA products thus affects competitive relationships among producers and distributors of various products, all linked by but one common factor: the motor vehicle. As a consequence, in order to show the net work of unlawful trade restraints and

inhibitions permeating the sales commission system of distributing TBA, it is necessary first to describe the marketing structure of Atlantic, and to define the manner in which this company exercises control over its wholesale and retail petroleum distributors, and next to describe how the sales commission plan enables Goodyear to integrate such market control into its own system of distribution.

#### DISTRIBUTION SYSTEM OF ATLANTIC REFINING COMPANY

Atlantic is a major integrated producer, refiner, and distributor of petroleum products. The company was organized in 1860, and was acquired by Standard Oil Company in 1874. Since the dissolution of the Standard Oil Trust in 1911, Atlantic has been operated as a separate corporate entity. In 1948, Mr. S. J. Heideman of Atlantic stated that "Atlantic's percentage of the *national* gasoline market is  $2\frac{1}{2}\%$  . . ."; and since the oil company markets its gasoline along the Atlantic Coast states and in parts of Ohio and West Virginia only, it may be inferred that Atlantic's share of gasoline sales in its own marketing area is substantially in excess of  $2\frac{1}{2}$  percent. Sales and operating revenue of this oil company totalled more than one-half billion dollars in 1954.

Atlantic markets its refinery products to three major classes of customers: (1) wholesale distributors; (2) retailers (chiefly service stations but including also garages, grocery stores, restaurants with outside gasoline pumps, etc.); and (3) commercial accounts. This opinion is not concerned with the last-named group, which accounted for 16.6 percent of total gasoline sales by Atlantic in 1954, as these accounts are customers who purchase for their own consumption and not for resale.

Atlantic sold gasoline and other petroleum products directly to some 5,537 retail customers in 1956, and these direct retail dealers accounted for 57.2 percent of total gasoline sales by Atlantic in 1955. Atlantic's direct dealers are of two classes: (1) Lessee dealers, who accounted for 39.1 percent of total Atlantic gasoline sales in 1955; and

(2) Contract dealers, who accounted for 18.1 percent of gasoline sales by Atlantic in the same year. Shown below in TABLE II are the numbers of lessee and contract dealers purchasing petroleum products directly from Atlantic in each of its marketing regions in June, 1956.

**TABLE II**  
**Numbers of Direct Lessee and Contract Dealers of**  
**Atlantic Refining Company in June 1956,**  
**by Marketing Regions**

Region	Lessee Dealers	Contract Dealers
New England .....	495	220
New York .....	321	263
Philadelphia-New Jersey .....	481	640
Eastern Pennsylvania .....	480	1075
Western Pennsylvania .....	317	725
Southern .....	399	121
GRAND TOTAL .....	2493	3044

*Lessee Dealers.* The principal characteristic distinguishing lessee dealers from contract dealers is that the former do not own their own business properties, but instead lease them from Atlantic. Lease terms range from three months to three years; most lessee-dealers operate under one-year leases, however. The leasehold instrument does not require the lessee to handle Atlantic products, but does provide that the premises shall be used for the operation of a "first-class automotive service station retailing petroleum products and TBA merchandise normally handled at competitive service station outlets." Rental payments by lessees are based on specified percentages of gross monthly sales of all types of merchandise, including TBA. These percentages are as follows:

0 percent.....	First \$500 monthly
6 percent.....	Next \$2000 monthly
5 percent.....	Next \$2000 monthly
4 percent.....	Next \$2000 monthly
3 percent.....	Over \$6500 monthly

At the time he executes his lease with Atlantic, each lessee-dealer is required to sign a separate document known as an "Eleven Point Lease Letter". This letter defines standards of operation for Atlantic lessee-dealers. Illustrative of these is the standard for "Housekeeping":

"1. Housekeeping—Clean, sanitary premises, inside and out."

Other standards set forth in the "Eleven Point Lease Letter" are "Use and Upkeep", "Display", "Illumination", "Personnel", "Hours of Operation" ("Uniform daily operating schedule based on buying habits of potential trade in the area"), "Services", "Adequate Inventory", "Sales Promotion", "Prices", and "Accounting". These standards of operation are implemented by Atlantic not only through the surveillance of its sales force, but also by the employment of "Phantom Customer Inspectors".<sup>6</sup>

Since its adoption on April 1, 1953, the "Eleven Point Lease Letter" has been used by Atlantic to interpret and enforce Paragraph Three of dealer leases which, as noted, provides that "... the sole purpose and use of the leased premises shall be the lawful, diligent and businesslike operation of a first-class automotive service station ...", thus the "Lease Letter" is an integral part of the lease itself. This is shown by the regularity with which Atlantic warns lessee-dealers in writing that their leases will be terminated if stated defaults with respect to the provisions of the

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<sup>6</sup> Witness John Chambers, former Atlantic lessee-dealer who testified in support of the complaint in this proceeding, received the following letter from his former Atlantic District Sales Manager on October 14, 1954:

"Dear John:

"Our Phantom Customer Inspector has just reported to us that you received a 299 out of a possible 300 on a recent inspection.

"This is the kind of job which makes us all very happy and certainly is an important factor in running a profitable service station."

Witness Chambers' lease was subsequently terminated because he refused to go along with Atlantic's pricing policy and because he did not purchase sufficient quantities of sponsored TBA.

"Eleven Point Lease Letter" are not remedied within fifteen days.<sup>7</sup>

Prior to about August 1953, Atlantic's written agreements with its lessee-dealers also included an "Atlantic Franchise Agreement", providing for their purchase of motor fuels and automotive lubricants from their oil company lessor under stated terms and conditions. In recent years, only automotive lubricants have been covered by written purchase agreements between Atlantic and its lessees. Nevertheless, the facts of record clearly establish that Atlantic lessees purchase and resell Atlantic motor fuels exclusively.

Notwithstanding the economic power possessed by an oil company as a consequence of being both landlord and supplier to its lessee-dealer customers, the powers and responsibilities of an oil company's lessee-dealer "... satisf[y] all the requirements of an independent enterprise." *United States v. Richfield Oil Corp.*, 99 F. Supp. 280, 288 (1951) *aff'd*, 337 U. S. 922 (1952); Judge Yankwich's comments in the *Richfield* case as to the relationship of an oil company to its lessee-dealers apply with equal force to the instant case:

"Implicit in the contract is the lessee's assumption of obligation and responsibility for his own acts upon the premises and those of his employees in their relation to the public, who come in contact with them during the time of his dominion. The lessee is not the employee of Richfield. Richfield

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<sup>7</sup> Here, for example, is a letter dated December 8, 1953 to dealer Michael J. Clifford, Baltimore, Maryland:

"1. From observations, we note that your regular hours of operation are such that we believe your market area is not being properly supplied.

"2. We also note from observations that inventories maintained in your station are not adequate to serve normal customer needs without delay."

(This dealer's lease was terminated January 4, 1954, for non-compliance with the above defaults.)

pays him no wages or other remuneration. He must carry his own workmen's compensation. He is not carried on their books as an employee for the purpose of social security taxes or any of the withholding taxes, state or federal, incidental to the employer-employee relationship. Richfield is not required to withhold any moneys from him for income tax purposes. Neither are they required to perform any of the duties just mentioned as to any of the employees who may assist the lessee in the conduct of the station or of any auxiliary repair work upon the premises. The lessee is solely responsible for his own conduct and that of his employees which may cause damage to the persons or property of others." [99 F. Supp. at 288]

*Contract Dealers.* There were 3,044 contract dealers of Atlantic as of June, 1956, and of this number about 50 percent operated service stations (as distinguished from grocery stores, garages, and similar outlets with gasoline pumps on the premises). Non-service station outlets generally do not purchase and resell TBA products; all service station outlets, however, are regarded as potential purchasers of TBA under Atlantic's agreements with Good-year and Firestone.

Although contract dealers either own their own service station properties, or lease them from parties other than Atlantic, these dealers are subject to the control of Atlantic as a consequence of various contractual agreements between such dealers and Atlantic. Chief among these is an agreement having the following principal provisions:

"1. EQUIPMENT LOAN. ATLANTIC, reserving the right of addition, change, substitution, and maintenance, lends to BUYER [the contract dealer] for the purpose of storage and sale of motor fuel purchased solely from ATLANTIC and for no other purpose, equipment that has been installed or which ATLANTIC may install, which shall remain personalty and the



property of ATLANTIC, and which BUYER shall not remove, but shall repair and maintain as follows.”  
[Lists equipment.]

“2. SALE AND DELIVERY. Provides that the contract dealer shall buy a specified number of gallons of motor fuel annually from Atlantic; that deliveries will not exceed one-eighth of such gallonage monthly; that the contract dealer ‘shall order and accept not less than one-twentieth of such annual gallonage in any calendar month’; and that the times, manner and quantities of delivery shall be in accordance with Atlantic’s current practice.”

The agreement further provides that all petroleum products delivered thereunder shall be paid for at prices established by Atlantic. The term of such agreement is generally for one year, and may be terminated by either party at the end of the original or any subsequent term by giving 60 days notice. Upon termination, Atlantic is entitled to repossess any equipment loaned to the dealer, with or without legal process. If the agreement is cancelled by Atlantic because of breach by the dealer ‘he dealer must pay a fixed sum to Atlantic as reimbursement for cost of installation and removal of the equipment or, *at its option*, Atlantic may leave the equipment in place and require the dealer to pay a fixed sum for the value of the equipment and improvements. The equipment most frequently loaned (without charge) by Atlantic to contract dealers includes gasoline pumps, underground storage tanks, compressors, air towers, lifts, signs, outside lighting and poster frames.

Both lessee-dealers and contract dealers have agreements with Atlantic relating to annual purchases of specified quantities of automotive lubricants, and to the terms upon which credit may be extended by these dealers to the approximately 160,000 holders of Atlantic credit cards.

*Wholesale Distributors.* This class of customers purchases refinery products from Atlantic for resale under the oil company’s brand names. Wholesale distributors main-

tain bulk storage tanks capable of receiving truck deliveries of gasoline from Atlantic, and maintain their own delivery equipment for transporting such gasoline from their bulk storage tanks to retail customers, including service stations. There were 236 wholesale distributors of Atlantic products in 1956, who resold to 2,897 service stations, as shown by Table III:

TABLE III

Numbers of Wholesale Distributors of Atlantic Refining Company, and Service Stations Supplied by them in June, 1956, by Marketing Regions

Region	Distributors	Service Stations
New England.....	8	151
New York.....	39	238
Philadelphia-New Jersey..	0	0
Eastern Pennsylvania.....	77	925
Western Pennsylvania.....	26	410
Southern.....	77	1,173
Grand Total.....	236	2,897

Atlantic had wholesale distributors in each of its six principal marketing regions in 1956, with the exception of the Philadelphia-New Jersey region. (There were 1,121 Atlantic service station outlets in the Philadelphia-New Jersey region in 1956, but all were supplied directly by the oil company.) These distributors accounted for 24 percent of total gasoline sales by Atlantic in each of the years 1951 and 1954. Eighty-seven percent of the 2,897 service stations supplied by wholesale distributors of Atlantic in 1956 were in the Eastern Pennsylvania, Western Pennsylvania, and Southern regions; the remaining 13 percent were in the New England and New York regions.

Wholesale distributors are parties to the same type of sales contracts for automotive fuels and lubricants with Atlantic as are Atlantic's contract service station dealers. Moreover, Atlantic has the power to change the source of supply for service station dealers from Atlantic itself to

wholesale distributors. During the period from April 1950 to June 30, 1956, Atlantic reassigned 53 contract service station dealers in the Wilmington, Delaware and Baltimore, Maryland sales districts from itself to particular wholesale distributors in those districts. Atlantic's use of the power to expand a wholesale distributor's retail market by adding to the number of service stations supplied by such distributor in order to induce such distributor to purchase and resell sponsored TBA to his service station customers was described by witness Lingenfelter, a salesman for Reading Batteries, Inc. (now the Reading Battery Division of the Electric Auto-Lite Company), who testified in support of the complaint.

#### THE ISSUE OF COERCION

The complaint in this case charges that Atlantic has caused its various classes of dealers to purchase substantial quantities of Goodyear or Firestone TBA through the use of threats to terminate either their tenure as lessees (if lessee-dealers) or their petroleum supply and equipment loan contracts (if contract dealers). It is conceded by counsel supporting the complaint that when Atlantic adopted the sales commission system on March 1, 1951, all its dealers were informed by letter entitled "A Statement of Atlantic's TBA Policy" as follows:

*"Our sales organization has been instructed to explain and demonstrate to you the many advantages of the new TBA plan. They will do so with enthusiasm and conviction because they are confident that it will be advantageous for you to accept it. However, your acceptance or rejection of the program is a matter of your own choice."* (Emphasis added.)

Notwithstanding this initial statement of policy by Atlantic, repeated periodically thereafter in form letters sent to its dealers, counsel supporting the complaint contend that in practice this officially-proclaimed policy has been ignored by Atlantic and that in fact, Atlantic dealers have been

orally advised by sales officials of the oil company that their continued status as Atlantic dealers and lessees will be in jeopardy if they do not purchase sufficient quantities of sponsored TBA. This contention is supported by the testimony of former Atlantic dealers who appeared as witnesses and further reinforced by the testimony of witnesses representing many suppliers of TBA engaged in competition with Firestone and Goodyear, who testified that they encountered difficulty in selling TBA to Atlantic dealers because the latter group felt that they were required to purchase sponsored TBA and feared reprisal by Atlantic if they purchased non-sponsored items. Testimony of the competing TBA suppliers as to reasons given by Atlantic dealers for not purchasing competitive TBA was allowed under the authority of *Lawlor v. Loewe*, 235 U. S. 522 (1915). This testimony was received not as proof of the facts recited, but for the purpose of showing the state of mind of the Atlantic dealers. Such testimony is competent to show that Atlantic dealers did not purchase a substantial amount of competitive non-sponsored TBA because of their feeling that they were required to purchase Goodyear or Firestone TBA.

Among the former Atlantic dealers who testified in support of the complaint, several recounted specific instances in which either express or implied threats of lease cancellation were made. Other ex-Atlantic dealers testified to incidents occurring during their tenure as Atlantic lessees which made it apparent to them that they were expected to handle either Goodyear or Firestone TBA, and that if they failed to purchase sufficient quantities of such TBA, that their relationship with Shell might be terminated.

Typical of the former Atlantic dealers testifying in support of the complaint was witness John Chambers, who operated an Atlantic station in the Philadelphia area from 1945 until November 28, 1954. He gave this account of the events occurring when Atlantic changed over from the Lee-Exide program to the sales commission plan in 1951:

Q. Mr. Chambers, referring . . . to the dealer meeting when the switch-over to the Goodyear TBA

line was announced, were you given any choice as to the brand of TBA that would be carried by Atlantic?

A. No, there was no choice; I mean the company said that they were going from one product which would be Lee and Exide, over to full Goodyear.

Thereafter, witness Chambers commenced purchasing Goodyear TBA from the local Goodyear distributor to whom he had been assigned, a Mr. Parris. From time to time, however, he also purchased TBA products from other suppliers in his area. Among these were the following:

Chester Auto Parts  
Chester, Pennsylvania

Waxes and other  
accessories

V. J. Auto Parts  
Sharon Hill, Pennsylvania

Accessories, including  
"Barsleak", a radiator  
"sealer"

C. A. Powers  
Chester, Pennsylvania  
(A Goodyear tire distributor)

Recapped tires, and also  
some new Goodyear tires  
and tubes

Witness Chambers testified that he was criticized by Atlantic salesmen for purchasing accessories from wholesalers other than Mr. Parris, his assigned supplier:

Q. Were any comments ever made by Atlantic representatives concerning your purchases of accessories from other than Ed Parris? A. Yes.

Q. Would you please state some instances? A. . . . the one that is greatest in my memory right now was the Barsleak, . . . Joe Connelly was Atlantic [salesman] at that time, and Joe would pick it up and say, "What are you doing with this," and he would set it back down.

Q. Were any comments other than the one referred to made by Atlantic representatives con-

cerning the purchases of TBA from local jobbers other than Ed Parris?

A. Why yes, there was great criticism, shall I say, in reference to outside [i. e., non-sponsored] merchandise.

Q. Who made these criticisms?

The Witness: Why salesmen who represented the company.

Q. Which company? A. Atlantic.

Q. Where did these conversations take place between the Atlantic salesmen and you? A. Many times over a cup of coffee and sometimes out in the driveway. Q. Would it generally be a private conversation? A. If it was to be of that private nature, yes.

Q. Well, when it was a criticism, was it generally of a private nature? A. It was never done openly.

Subsequently, in November 1954, witness Chambers was notified that his lease would not be extended beyond December 31, 1954. He discussed this with Mr. Parris, his TBA supplier, who was also a former employer of witness Chambers:

Q. . . . what was the substance of your conversation with Mr. Parris? A. I asked, "what in the world happened, what could I do." He said, "Jack, you have been turned in by three [Atlantic] . . . salesmen for buying outside merchandise." I said "Who?" He said, "Connelly, Muldoon, and Petri-son" turned me in for buying outside merchandise.<sup>8</sup>

<sup>8</sup> Atlantic regarded witness Chambers as an excellent service station operator, as is shown by the letter to him of October 14, 1954, quoted *supra*, note 6. This letter of commendation was received by witness Chambers just one month before he received notification that his lease would be terminated.



The above testimony must be assessed in the light of that given by Mr. Glenn L. Wetzel, President of Chester Auto Parts, Inc., of Chester, Pennsylvania. His company sells automotive parts, batteries and accessories (but no tires) at wholesale. Witness Wetzel gave this account of his conversation with witness Chambers:

Q. Do you recall any other conversations with other Atlantic dealers or Sinclair dealers, along similar lines? A. Yes. John Chambers.

Q. Please state the time as nearly as you can, the place, and what was stated. A. I would approximate the time as about 1953, possibly 1954. I wouldn't know exactly any more. But it was to the effect that he had to stop buying from me. He was told that he was buying too much on the outside from outside distributors, meaning V. J. Auto Parts and myself, which were specifically named.

Q. Now will you please state what the conversation was? A. Jack said to me: "Glen, I am going to have to stop buying from you. I have been warned that if I don't, I am going to be removed from this station. They are going to give me the ax." And two months later he got the ax.

Further testimony as to the state of mind of witness Chambers in 1953 and 1954 was given by witness Joseph Marabella, a partner in the firm of V. J. Auto Parts Company, Folcroft, Pennsylvania. Mr. Marabella testified as follows:

Q. And did you solicit Bars Leak (sic) business from Mr. Chambers when he was an Atlantic lessee-dealer? A. Yes sir.

Q. And what was your experience with respect to the sale of Bars Leak to Mr. Chambers? A. My, well, business relations and experience with Mr.

Chambers had been the same as with other gentlemen I have mentioned, enjoying good business relations, good sales on Bars Leak, up until the time he was told to remove it from his shelf, . . . .

Later, witness Marabella tried to sell Mansfield tires and tubes to witness Chambers and to another Atlantic dealer named Booz:

A. Well, in the latter part of 1954 with Mr. Booz, Elmer Booz, Wycombe Avenue and McDade Boulevard in Darby, I along with a Mansfield tire representative went in to solicit some of Mr. Booz's tire business. He said, "Joe, I'd be glad to buy them on a fill-in basis, but you know I cannot put anything in here but Goodyear tires and Goodyear tubes." And that was the extent of the conversation.

Q. Do you recall any other conversations with Atlantic dealers along similar lines? A. Jack Chambers, we solicited him the same day at his station which was Clifton Avenue and Chester Pike in Sharon Hill, in his office, told us he was sorry to waste our time but more or less the same answer, that he couldn't put anything but Goodyear in there.

Documentary evidence taken from the files of Atlantic reveals the vigor with which Atlantic carried out its campaign to replace Lee tires and Exide batteries with Goodyear and Firestone TBA products. The minutes of a meeting of Atlantic's Regional TBA coordinators held on October 21, 1951, reveal that as of that date, "New England reported that approximately 98% of their accounts have been signed on a Goodyear program and that they are getting about 75% of the tire business they formerly enjoyed from these accounts. New York reported that they had about 96% of their accounts signed on a Goodyear program and that they were getting about 65% of their former tire business . . ." By December 24, 1951, an Atlantic report showed that virtually all Atlantic dealers in

Goodyear's assigned territory who were potential purchasers of TBA had signed contracts agreeing to handle Goodyear products.

Accompanying the campaign to sign Atlantic dealers to Goodyear contracts was a drive to install Goodyear signs and advertising materials in Atlantic stations throughout Goodyear's assigned marketing areas. This is an excerpt from a letter of July 30, 1951, from Atlantic's TBA sales manager, Mr. Heideman, to another Atlantic official:

"I asked Mr. O'Neill of the Goodyear Tire & Rubber Company to supply me with a list of the Atlantic dealers in the Philadelphia Region who refused to be identified on the Goodyear Program. Attached is a list of 46 dealers who, for reasons indicated, have refused this service.

"You will probably wish to review the respective portions of this list with the District Managers concerned. Undoubtedly, facilities for identification are not the best at some of these locations, but with the others it is apparent that the proprietors have not been sold on the Goodyear program. In such instances, I believe that additional sales effort is called for. In any event, would you be kind enough to advise me at your convenience what action you have taken with regard to this list."

Mr. Heideman followed this letter up himself on August 21, 1951, with a letter to Mr. S. A. Gaylord, Manager, Petroleum Sales Department, of Goodyear:

"I wonder if you can furnish me promptly with a report on the progress of the subject program. I should like to have this information broken down by our regional territories. As I understand it, the signs are being erected by Goodyear crews, but the decals are being erected by outside agencies. Furthermore, at the present time when we locate an Atlantic dealer who is without any Goodyear identification or without one or the other signs or decals,

we do not know whether an unsuccessful attempt has been made to complete the assignment or whether all or part of the job, whatever the case may be, is scheduled for attention.

"We should like to interest ourselves in the cases where an unsuccessful attempt has been made to provide the Goodyear identification. Perhaps this information could be made available to us in simplest form by stating the Atlantic District areas that have been covered by either sign crews or agencies that are applying the decals, and by supplying us a list of the dealers where attempts to erect decals or signs were unsuccessful.

"I have already received a list of this type for the Philadelphia and South Jersey areas, and this has been referred to our District Managers for further attention. However, I do not know if this is a partial or complete list of the dealers in that territory who could not be identified with Goodyear signs."

Atlantic's "sales efforts" met with complete success, for the entire group of 46 recalcitrant dealers referred to in Mr. Heideman's letter of July 30 was thereafter signed to Goodyear contracts and Goodyear advertising signs were installed at their stations. The letter of complaint from Lee Rubber and Tire Corporation to Atlantic over the question of removal of Lee advertising signs from Atlantic stations has already been referred to, supra at page 15. And on March 5, 1951, Mr. E. W. McCreery, another Lee vice president, stated in an intracompany memorandum referring to the Atlantic sales regions assigned to Firestone:

"In analyzing salesmen's reports on their calls on Atlantic accounts and with other information that we have, we are doubtful that many of the #2 type stations will stay on Lee tires. Because these stations are leased from Atlantic, some on a month-to-month basis, others on 90 days or longer basis, they

are not in a position to take an independent stand and as a result will probably find it expedient to handle Firestone tires."

In our opinion, the documentary evidence in this record—only a fraction of which is referred to above—and the testimony of the various representatives of suppliers of TBA competing with Goodyear and Firestone previously adverted to lend credence to the testimony of the ex-Atlantic dealers who gave evidence in support of the complaint in this proceeding. We affirm the hearing examiner's finding that agents of Atlantic have in fact coerced a substantial number of Atlantic dealers to purchase substantial quantities of Goodyear and Firestone TBA, and that Atlantic has accepted the benefits of such coercion in the form of sales commissions.

Respondent Atlantic cites *United States v. J. I. Case Co.*, 101 F. Supp. 856 (D. C. Minn. 1951) as authority for the proposition that the hearing examiner erred in concluding that Atlantic has coerced a substantial number of its dealers in violation of Section 5 of the Federal Trade Commission Act. This District Court opinion is commonly regarded as a notable exception to the trend of decisions dealing with the subject of exclusive dealing.<sup>9</sup> But we need not dwell on the *Case* decision, since the subject of coercive practices has received careful scrutiny from the Seventh Circuit and from the Supreme Court in a line of cases in the field of automotive financing. In *United States v. General Motors Corp.*, 124 F. 2d 376 (7th Cir. 1941), General Motors and its affiliates, General Motors Sales Corporation, General Motors Acceptance Corporation, and General Motors Acceptance Corporation of Indiana, Inc., appealed from a conviction of criminal conspiracy in violation of the Sherman Act. The indictment charged that these defendants had conspired to coerce franchised dealers of General Motors Corporation to finance their purchases and sales of automobiles through

<sup>9</sup>Robinson, *Providing for Orderly Marketing of Goods*, 15 A. B. A. Antitrust Sec. 282, 308 (1959).

General Motors Acceptance Corporation. In affirming the criminal convictions, the court stated:

"The record leaves no doubt that the dealer body as a whole was made acutely aware and had knowledge of the set policy of the appellants with respect to the use of GMAC financing facilities. The fear of cancellation or refusal to renew contracts was great, so much so that the dealer was reluctant to refuse the terms and policies dictated by the appellants."

Approving the trial judge's instructions to the jury in the *General Motors* case, the Supreme Court stated in *Ford Motor Co. v. United States*, 335 U. S. 303 at 316-317 (1948):

"... Their plain effect is to draw a line between such practices as cancellation of a dealer's contract, or refusal to renew it, or discrimination in the shipment of automobiles, as a means of influencing dealers to use GMAC, all of which falls within the common understanding of 'coercion,' and other practices for which 'persuasion,' 'exposition' or 'argument' are fair characterizations."

We are of the opinion that the record contains ample evidence to support the hearing examiner's finding that Atlantic has coerced and forced a substantial number of its dealers to purchase sponsored TBA. However, we regard these overt acts of coercion as mere symptoms of a more fundamental restraint of trade inherent in the sales commission system itself. The more dramatic and immediate impact of this system, to be sure, is upon retail service station dealers of Atlantic and other oil company dealers similarly situated. Their freedom to buy and sell as independent merchants is shown to be less complete in practice than in theory. Yet from the point of view of the anti-trust laws, it is the competitive effects of the sales commission system on competitors of Goodyear and Firestone which raise the most grave questions in this proceeding.



We turn, therefore, from an examination of the restrictive effects of the sales commission system upon service stations as buyers of TBA to an assessment of this system's impact upon wholesale and retail distributors of TBA engaged in competition with wholesale and retail distributors of Goodyear and Firestone. Preliminary to this inquiry, however, it will be helpful to have a more detailed understanding of the manner in which the sales commission plan enables Goodyear to integrate into its own nationwide distribution system the economic power possessed by Atlantic over its wholesale and retail petroleum outlets.

#### THE SALES COMMISSION PLAN IN GOODYEAR'S SYSTEM OF DISTRIBUTION

Goodyear is the largest manufacturer of rubber products in the United States, with net sales of more than one billion dollars in 1954. The company has tire and tube factories located respectively in the states of Ohio, Alabama, Michigan, California and Kansas. There are 57 Goodyear warehouses across the land, and Goodyear tires, tubes and accessories are distributed to wholesale and retail distributors through these warehouses. Batteries, because of the weight factor, are not warehoused by Goodyear except for emergency needs; all Goodyear wholesalers order "Goodyear" batteries directly from the factories of the two companies which produce "Goodyear" batteries under contract: Electric Auto-Lite Company and Gould-National Batteries, Inc.

Goodyear has approximately 500 company-owned and operated retail stores throughout the United States, and these stores also sell at wholesale. Apart from such company stores, there are more than 12,000 independent franchised stores selling Goodyear products at wholesale and retail and an unknown but very substantial number of firms not franchised by Goodyear but which purchase and resell Goodyear merchandise in the same manner as franchised Goodyear dealers. Franchised dealers are sometimes referred to as "direct" accounts, and non-franchised

dealers in Goodyear merchandise are sometimes referred to as "indirect" or "associate" accounts.

All direct Goodyear accounts, which include independent franchised Goodyear dealers, wholesale petroleum distributors of Atlantic, and some retail petroleum dealers of Atlantic, execute a franchise agreement with the Goodyear Company itself, and purchase Goodyear products from the nearest Goodyear District Sales Office. Indirect, or associate Goodyear dealers do *not* have contracts with the Goodyear Company and do *not* purchase Goodyear TBA from the Goodyear District Sales Office. Instead, they usually execute a "Goodyear Associate Dealer Agreement" with the particular Goodyear wholesaler to which they are assigned. Such wholesaler may be either a company-owned store, a franchised independent dealer of Goodyear, an Atlantic wholesale petroleum distributor, or an Atlantic retail petroleum dealer. Indirect, or associate, dealers normally purchase from the wholesaler to which they have been assigned, and normally pay higher prices for merchandise than do direct dealers of Goodyear.

Most service station customers, including Atlantic stations, are classified as indirect or associate dealers by Goodyear, although, as noted, some Atlantic stations are direct dealers of Goodyear and function as supply points to other Atlantic stations which are merely associate dealers. (The term "supply point" is used by respondents to refer to the local TBA supplier to which local Atlantic stations have been assigned.) A number of Atlantic wholesale distributors of petroleum products also function as supply points for Goodyear, and distribute TBA to the same retail stations which the wholesale distributors supply with Atlantic petroleum products. A supply point, then, is a local wholesaler of Goodyear TBA, although it may also be a retail dealer of Goodyear, a retail dealer of Atlantic, or a wholesale distributor of Atlantic as well. In the three marketing regions of Atlantic assigned to Firestone, the same classification of Atlantic dealers into direct and indirect accounts of Firestone is found as is described above with respect to Goodyear, and in all other material

respects the sales commission plan between Atlantic and Firestone functions in substantially the same manner as does the sales commission plan between Atlantic and Goodyear described herein.

An integral part of the Goodyear-Atlantic and Firestone-Atlantic sales commission plans is the assignment or allocation of each Atlantic retail outlet to a specific supply point designated by Goodyear or Firestone. When a new Atlantic station is opened, or when a new dealer replaces a retiring operator, Atlantic reports to Goodyear (or to Firestone, as the case may be) the name and address of the new Atlantic dealer on an appropriate Goodyear (or Firestone) form. The Goodyear (or Firestone) District Manager then assigns this outlet to a specific supply point and notifies the supply point and the Atlantic outlet of the assignment which has been made. No sales commission is paid to Atlantic unless the Atlantic outlet purchases from the designated supply point to which it has been assigned. In other words, even though an Atlantic dealer purchases Firestone or Goodyear TBA exclusively, unless he buys from his assigned supply point, Atlantic receives no sales commission. One reason why Goodyear does not pay a sales commission when TBA merchandise is purchased by an oil company dealer from someone other than his assigned supply point was set forth in a letter dated December 19, 1951, addressed to an official of Shell Oil Company, and signed by the Baltimore District Manager of Goodyear:

"I am returning to you, unsigned, two G-1209's which request that G. D. Armstrong Co., Inc., of Laytonsville, Md., be approved as a supplying dealer for Laurel Park Servicenter at Laurel Park, Md., and Bowie Shell Service at Bowie, Md.

"My reason for taking this attitude is the fact that we very definitely discourage our dealers from selling Goodyear tires outside of their authorized territory, and in servicing either Laurel or Bowie, the Armstrong Company are out of their territory.

"A situation of this kind, of course, presents us with a serious problem for, naturally, we are not in a position to dictate to any good dealer exactly where he may sell the merchandise which he purchases from us—all we can do is ask that they remain within the boundaries which we establish. However, in the case of oil company stations where we have already authorized and established an ample number of supply points, all with good service, we cannot pay the oil company in question a commission on merchandise delivered by a dealer who is operating outside of his territorial boundaries."

Although in some cases Atlantic dealers are assigned to more than one supply point of Goodyear, in none of Atlantic's marketing regions are Atlantic dealers assigned to supply points of both rubber companies. For, as has been shown, Atlantic's sales commission contract with Goodyear is confined to the company's New England, New York and Philadelphia-New Jersey sales regions, whereas Atlantic's sales commission contract with Firestone is operative only in the Eastern Pennsylvania, Western Pennsylvania and Southern sales regions of the oil company.

A reporting technique has been established whereby Atlantic may determine the exact amount of sponsored TBA purchased by each Atlantic outlet from its assigned supply point or points each month. As both rubber companies use substantially the same reporting procedure, only the one used by Goodyear need be described in detail here.

Once every month each Goodyear supply point submits a report to the Goodyear District Sales Office for his district, showing his sales of TBA during the past month to each Atlantic outlet assigned to him.<sup>10</sup> The Goodyear Dis-

<sup>10</sup> One exception is Atlantic service stations acting as supply points. A 7½ percent commission is paid by Goodyear to Atlantic on the net sales value of TBA purchases by these Atlantic supply point dealers, and, consequently, no further commission is paid by Goodyear on the resale of merchandise by such Atlantic supply points to other Atlantic stations supplied by them.

trict Sales Office then compiles these reports into a master list, showing TBA purchases by each individual Atlantic dealer from his assigned supply point during the past month, and sends copies of this list to Atlantic and to Goodyear's home office in Akron, Ohio. Although these forms provide the basis for computation of sales commission accruing to Atlantic each month, they also afford Atlantic a means of determining the volume of sponsored TBA purchases by individual Atlantic dealers during that time.

A different procedure is followed with respect to TBA purchases by wholesale distributors of Atlantic (including, as indicated by footnote 10, *supra*, Atlantic retail dealers functioning as supply points). Wholesale distributors purchase directly from the Goodyear or Firestone district offices, and then resell such TBA to their retail dealers. Some 2,897 Atlantic retail outlets were supplied by wholesale distributors in 1956. Atlantic receives a 7½ percent sales commission on the net sales value of all sponsored TBA purchased by wholesale distributors, but no additional sales commission is paid when such purchased TBA is resold to retail dealers supplied by the wholesale distributors.

Goodyear has sales commission contracts with a number of other marketing oil companies, and these agreements are in all material respects identical with the Goodyear-Atlantic contract. Total sales by Goodyear under its sales commission contracts with such other oil companies, including Shell Oil Company and D-X Sunray Oil Company, increased from about \$16,700,000 in 1951 to about \$36,105,000 in 1955, with sales commissions paid thereon by Goodyear increasing from approximately \$1,600,000 in 1951 to approximately \$3,300,000 in 1955. The evidence of record in this case shows that oil companies other than Atlantic have employed coercive tactics in requiring their dealers to purchase Goodyear TBA. Witness S. K. Osborn, for example, was a Sinclair dealer for 20 years, from May 1936 until May 1956. He was also a distributor of Firestone tires, and could therefore purchase Firestone tires at lower prices than Goodyear tires. He testified that he stocked Firestone tires exclusively at his service station



until 1948, at which time he was given a notice of lease cancellation:

A. It was a few days after I got the lease cancellation. I was disturbed about it, and I wanted to find out what it was all about. I called up the company and finally got an interview with Mr. Weller, and Mr. McCauley [Sinclair officials] . . . I asked them why I was getting a lease cancellation. They told me that I wasn't doing the right things by them, that Goodyear tires, batteries and accessories were just as much Sinclair products, just as important to the company, as Betholine gas, Sinclair Gas, whatever they were marketing, and Opaline oil. And I promised to go along with their wishes. I gave them an order for Goodyear merchandise. In a few days I had a new lease.

Q. You say you gave them an order for Goodyear TBA merchandise. Do you recall the approximate amount of the order? A. A thousand or more dollars worth.<sup>11</sup>

In order to keep his service station lease, therefore, this Firestone distributor was placed in the anomalous position of having to purchase Goodyear TBA, a competing brand, in order to maintain his status as lessee of a Sinclair service station.

Another former lessee-dealer, witness MacMasters, who operated a Sinclair station from 1944 until 1954, testified that he purchased Bowers batteries for resale at his station up to sometime in 1947 or 1948. At that time he was summoned to a conference with top-level Sinclair personnel at the oil company's offices:

A. We went into a conference room, some sort of conference room that had quite a large table. They

<sup>11</sup> In *Osborn v. Sinclair Refining Co.*, F. 2d (4th Cir. 1960), the Court of Appeals held that the facts recited above by witness Osborn constituted an unlawful tying contract violative of Section 1 of the Sherman Act.

[Since the writing of the Commission's opinion the *Osborn* case has been reported as follows: 286 F. 2d 832 (4th Cir. 1960), cert. denied, 366 U. S. 963 (1961).]



put me on one side of the table, and the other three down the other side.

So, to make the conversation short, Mr. McCauley was in a hurry and he said, "We will make this brief, Mac. You are not buying batteries from us."

I said, "No, Mac, I can't buy batteries from you. I owe an allegiance to Bowers because they took care of me during the war and immediately after the war, and I promised them if they would help me so I could remain in business satisfactorily, that I would see that they maintained and kept the business."

And his almost exact words were, "We don't give a good God damn who you think you owe, you are going to buy our [Goodyear] batteries or else."

And that was the end of the meeting."

Many other advantages accrue to Goodyear, and Firestone as well, as a consequence of their sales commission contracts with oil companies. A prime advantage is participation with each oil company's sales force in a number of joint merchandising programs. This advantage commences with the selection of persons to operate newly-opened service stations or to replace outgoing dealers in previously-operated stations. A continuing responsibility of Atlantic salesmen is to help newly-recruited dealers get established. Through these salesmen, the local Goodyear or Firestone supply points are notified of the names and addresses of new dealers *before* they actually take over operation of their stations and, as a result, before local competitors of Goodyear and Firestone in any community become aware of a new dealer's identity. This policy was implemented by a memorandum of April 25, 1952, by Atlantic's TBA Manager Heideman to Atlantic personnel:

*"Station Openings.* We ask that you instruct your Districts to establish, as a regular practice, *automatic and advance* notice to the Goodyear District Office, of the openings of any new stations, or of change in proprietorship at any dealer location. Such

notice will be mutually beneficial to both Goodyear and ourselves. It will enable Goodyear to complete any unfinished business with the outgoing dealer and, further, will enable them to anticipate and to move promptly in handling the new dealer's requirements."

The importance of advance notification is indicated by the fact that the initial stocking order of TBA costs approximately \$1,000—for large stations the amount may be much greater. And Atlantic's turnover of dealers is high. During 1955, 720 lessees of Atlantic ceased operation and had to be replaced, representing a turnover of about 29 percent of the oil company's total number of lessee-dealers in that year. Moreover, during the period March 1950 to June 1956, 389 new Atlantic stations commenced operations. Frequently these new or replacement dealers have recently completed Atlantic training schools in which Goodyear and Firestone TBA were used in demonstrations, and have already formed biases in favor of one or the other brand. However, the new dealer has no choice as to which of the two brands he will purchase and display—if his station is located in the three Sales Regions of the company in which Goodyear is sponsored, then he must take Goodyear TBA, and if his station is located in the three Sales Regions of Atlantic assigned to Firestone, then he must take the Firestone program.

Numerous other examples of joint merchandising programs favorable to the rubber companies having sales commission agreements with Atlantic could be cited. Although Atlantic officials stated in an intra-company memorandum shortly before the inception of the sales commission program that "Practically all sales promotional expense [will be] assumed by supplier [Goodyear]," Atlantic aggressively assists in carrying out the Goodyear program in various ways. For example, Atlantic salesmen obtain TBA orders from dealers and send them to local Goodyear supply points, recommend minimum Goodyear TBA inven-

tories to dealers, coordinate special Goodyear promotional programs with radio, television, and other forms of advertising by the Atlantic company and its dealers, and assist dealers in arranging Goodyear TBA displays. Atlantic credit card facilities are also available to motorists wishing to purchase Goodyear TBA products from Atlantic stations. Without doubt, however, the most effective joint merchandising tactic is dual solicitation, or "double-teaming." This refers to the practice of an Atlantic salesman accompanying a Goodyear or Firestone salesman in calls upon service station operators to urge them to purchase sponsored TBA.

Goodyear's heavy reliance upon double-teaming to convert Atlantic dealers from the Lee-Exide program to Goodyear TBA was set forth in a "Confidential" memorandum of February 27, 1951, from Mr. S. A. Gaylord, manager of the rubber company's sales commission programs with oil companies, to Goodyear District Managers located within the three Atlantic Sales Regions assigned to Goodyear:

"You have been advised of the Sales Organization Meetings [between Goodyear and Atlantic sales personnel]. Mr. McConky [Goodyear Northeast Division Manager] will keynote for his Division. He will welcome the opportunity and pledge strong support and cooperation. No doubt he will stress the importance of Atlantic and Goodyear personnel getting acquainted and teaming up together when presenting the Goodyear franchise to Atlantic dealers. Because the Atlantic salesman has the 'in', but cannot be expected to know the Goodyear story at the start, so by team work the Goodyear Sales Representative will make the presentation and also assist in training the Atlantic Representative.

"Two purposes will be accomplished by this teaming activity—first the Atlantic salesman will learn the basic details of our Franchise Presentation and, secondly—our Goodyear salesman will be very favorably introduced to the account through the sales influence of the Atlantic Representative, also bring up this point with your men."

Thereafter, on August 7, 1951, a Goodyear official wrote to Atlantic's TBA Manager, Mr. Heideman:

"Having reviewed your letter of July 30th, I am pleased to outline below for your consideration steps that I suggest be followed in the handling of a new Atlantic Dealer on the Goodyear T. B. A. Program:

"1. Arrange for double team contact by the Goodyear and Atlantic salesman."

Nine additional steps were outlined in this letter of August 7, the fifth being to "Take stock order (Tires, Batteries and Accessories)" and the sixth being to "Furnish initial price lists, tires, batteries and accessories." Goodyear thus appeared confident that the presence of an Atlantic salesman together with the Goodyear representative would render unnecessary any higgling or haggling over price *before* obtaining an initial order for TBA from Atlantic dealers.

Similar confidence in the efficacy of double-teaming activity was expressed in a memorandum setting forth action to be taken to introduce the sales commission plan to Atlantic outlets in the three Sales Regions assigned to Firestone:

"Double-teaming activity with Firestone and oil company salesmen is then scheduled in order to sell the oil company's dealers on the Commission Plan."

Atlantic's Vice President, Mr. D. T. Colley, inaugurated the sales commission program on March 1, 1951, with the following letter to the oil company's sales force:

"I am sure that the new T. B. A. program which we have carefully selected has so many advantages that it will not be difficult to convince Atlantic dealers and distributors of its superior merit. This job is to be done with the use of all the sales equipment and knowledge that we, or our suppliers, have at our respective commands. *I expect the results of our salesmanship to be highly successful.*

"You can appreciate the fact that under no circumstances are our dealers to be made to feel that they must buy this new program just because they are Atlantic dealers. The sales you make must be made on the merits of the program and your ability to sell the dealer on its advantages to him. *Any evidence that coercion or misrepresentation were used in securing acceptance would be most embarrassing to our company.* This program is a challenge to your sales ability. I am confident that you will do a fine selling job." (emphasis added)

These quotations reflect the belief of Goodyear and Firestone, as well as Atlantic, that the presence of an Atlantic salesman is the almost indispensable ingredient needed to insure the success of the two rubber companies in selling their TBA products to Atlantic dealers under the sales commission plan. Perhaps one reason for this is that the annual evaluation by Atlantic salesmen of their respective lessee-dealers carries substantial weight with District Managers of Atlantic when the latter group make decisions as to extensions of dealers' leases for another year. Although respondent Atlantic has made vigorous efforts to create a record image of the typical Atlantic lessee-dealer as a stoutly independent businessman, able to close up shop as an Atlantic lessee on Saturday night and reopen down the street in a Sinclair or an Esso station the following Monday morning, the record as a whole suggests that this is a romanticized picture of a small businessman who is, more often than not, in a woefully weak bargaining position vis-a-vis his oil company lessor.

The typical lessee-dealer's dependence upon his lessor-supplier is explained by the following facts: The cost of constructing an average Atlantic service station is about \$50,000. Few men who become service station operators have this amount of money—many have as little as \$1,000, and very few have as much as \$15,000. Most marketing oil companies, therefore, build a substantial portion of their own stations and lease them to operators. The lessee-dealer uses his own capital to purchase an initial inventory



of petroleum products, TBA, and tools and for other expenses incurred in commencing operations. It is frequently necessary for incoming dealers to borrow several thousand dollars from Atlantic in order to purchase these initial stocks of goods. Nor is the income of the typical lessee-dealer sufficient to enable him eventually to purchase his own station. Although an exceptional dealer with an unusually high-gallonage station may earn as much as \$20,000 per year, the average annual net income of Atlantic dealers is in the range of 6 to 10 thousand dollars. But no matter how long an operator may remain as lessee, and no matter how much he strives to establish goodwill in his community, the time may come when his lease is not renewed—for any one of a number of reasons or for no reason at all except that the lessor would prefer to have someone else operate that particular station.

Many of the control devices available to Atlantic in its relationship with lessee-dealers are also applicable to contract dealers. Many of the latter are indebted to Atlantic, and most of them lease storage tanks, gasoline pumps and other equipment from their oil company supplier. These equipment leases specify that such equipment may not be used for storage or sale of petroleum products purchased from any supplier other than Atlantic. And serious inconveniences would be caused for any contract dealer whose petroleum supply contract with Atlantic was not renewed from year to year.

Service station operators are understandably susceptible to the urgings and recommendations of their oil company suppliers and lessors in the matter of TBA. The Goodyear salesman encounters less buyer resistance on the part of such a customer when an oil company salesman is standing nearby adding his endorsement to the sales presentation of the Goodyear representative. The technique of dual solicitation ("double-teaming") thus symbolizes in microcosm the competitive effects of the sales commission method of distributing TBA when introduced throughout the entire marketing area of a major oil company. It is to these macrocosmic effects that we now turn.



# COMPETITIVE EFFECTS OF THE SALES COMMISSION PLAN AT THE MANUFACTURING, WHOLESALE AND RETAIL LEVELS.

A glance at MAP I, *supra*, suffices to show that competition between Firestone and Goodyear in selling to Atlantic oil company accounts has been wrecked by the operation of the sales commission system. But other evidence of record is available in abundance to illustrate the same point. The following is an exchange of correspondence between Atlantic and Goodyear concerning Republic Oil Company, a wholesale distributor of Atlantic products in Pittsburgh, Pennsylvania. (Atlantic's Western Pennsylvania sales region, it will be recalled, is assigned to Firestone.)

On August 2, 1951, Mr. E. C. Sauter, District Manager of Goodyear in Pittsburgh, addressed the following letter to Mr. F. W. McConky, Jr., Manager of Goodyear's Northeast Division:

"Republic Oil Co.,

"This is a Pittsburgh concern who are acting as distributor of Atlantic products in parts of Pennsylvania and Northern West Virginia.

"The retail division of this company operates about seventy-five (75) service stations. They have never gone into a TBA program and at present have no tire hook-ups. They are in process, however, of trying to get a deal with one of the major tire companies and would like to entertain a proposition from Goodyear whereby we would sell their stations direct or through supplying dealers at a price which would be in line with each outlet's volume with an override to the oil company.<sup>12</sup>

<sup>12</sup> Many service station operators and TBA dealers use the term "override commission" or "overriding commission" in referring to payments by a TBA manufacturer to an oil company such as those made by Goodyear and Firestone to Atlantic. However, as respondents and their witnesses usually use the term "sales commission" to refer to such payments, we are using "sales commission" in this opinion.

"Possibly we could use this additional distribution in the Pittsburgh area, particularly on passenger tires and tubes, so if you are interested possibly we should take the matter up with Petroleum Sales for their comments."

Thereafter, on August 3, 1951, the matter was referred by Mr. McConky to Mr. S. A. Gaylord of Goodyear in Akron:

"The attached from Eddie Sauter regarding Republic Oil and the possibility of their handling our products is a matter, in my opinion, for Akron decision, inasmuch as they [meaning Republic Oil] are distributors of Atlantic products.

"I don't want to spend any time lining up with these people if for example Atlantic-Philadelphia would prefer they handle Firestone, since this is the tire being handled by Atlantic in that area.

"Of course, I am not acquainted with the influence Atlantic might be able to bring to bear in forcing these people to a decision as to the line of tires that they—Atlantic—would like them to handle.

"At any rate, will you explore this from a management standpoint and advise so we can proceed according to Atlantic's desires."

On August 9, 1951, Mr. Gaylord addressed the following letter to Atlantic's TBA Manager, Mr. Heideman:

"Mr. Sauter, our District Manager at Pittsburgh, and Mr. McConky, advises that subject account is considering marketing T.B.A. products and have invited us to submit a proposal.

"Before taking any action in the matter we felt that we should take the matter up with you for further guidance and your good counsel in the matter.

"Will appreciate hearing from you on this as soon as possible."

On August 14, 1951, Mr. Heideman replied to Mr. Gaylord under the heading "Republic Oil Company":

"Your note of August 9th has been received. Any overtures on your company's part to the subject could upset negotiations that we have underway at present. It was thoughtful of you to consult us and needless to say we appreciate it *as we will also appreciate your rejection of the invitation.*" (emphasis added.)

Not only has competition between Goodyear and Firestone been eliminated as a result of these companies' sales commission contracts with Atlantic, but even *within* Atlantic's sales regions assigned to Goodyear, competition among Goodyear wholesalers for the business of Atlantic accounts has been eliminated through the assignment of each Atlantic account to a designated supply point. There are 1,155 independent franchised Goodyear dealers in the Atlantic marketing territories assigned to Goodyear, but only 128 of these dealers, or *11 percent*, are supply points for Atlantic dealers. The remainder, representing 89 percent of all Goodyear dealers in the three Atlantic sales regions, are substantially foreclosed from access to Atlantic accounts.

Nor is this anticompetitive allocation of customers by Goodyear among its wholesale distributors confined to Atlantic accounts alone—nine other oil companies have sales commission contracts with Goodyear, and as shown by Table IV, below, only a minute fraction of the total number of Goodyear dealers in any of these oil companies' marketing areas have been nominated as supply points for local oil company outlets:

TABLE IV

Goodyear Dealers Acting as Supply Points for Oil Company  
Outlets Compared with Total Number of Goodyear Dealers  
in Each Oil Company's Marketing Area

Name of Oil Company	Total Number of Goodyear Dealers in Marketing Area	Number of Goodyear Supply Points
Anderson-Pritchard .....	3,825	28
Ashland & Subsidiaries.....	2,387	87
Carter .....	1,509	73
D-X Sunray .....	6,772	162
Quaker State .....	482	14
Richfield .....	1,691	3
Shamrock .....	1,717	25
Shell .....	10,756	679
Sinclair .....	10,963	10
Atlantic .....	1,155	128

The extent to which competition among Goodyear's own dealers at the wholesale level has been shattered by the operation of the sales commission plan may be inferred from the data in TABLE IV. In Shell's marketing area, for example, there are 10,756 Goodyear dealers; yet only 679 of these dealers have been appointed as supply points to Shell stations. In the marketing territory of D-X Sunray Oil Company there are 6,772 Goodyear dealers, but only 162 have been granted the privilege of becoming a supply point. And in Atlantic's New England, New York, and Philadelphia-New Jersey sales regions, only 128 out of 1,155 Goodyear distributors have been named as supply points.

To illustrate the elimination of competition among TBA wholesale dealers caused by the sales commission plan, evidence adduced in the course of hearings in Atlantic's Philadelphia-Suburban Sales District (one of several sales districts comprising Atlantic's Philadelphia-New Jersey Sales Region) may be considered. As of June 30, 1956, there were 226 lessee dealers and 291 contract dealers of Atlantic

in this district. These dealers were assigned to three Goodyear company stores and six independent franchised Goodyear distributors in the Philadelphia metropolitan area as follows:

TABLE V

Goodyear Supply Points in Atlantic's Philadelphia-  
Suburban Sales District and Atlantic Dealers  
Assigned to them, 1956

Supply Points	No. Lessee Dealers*	1955 Total Sales	No. Contract Dealers*
Goodyear District Office .....	\$ 43,845	2	6
Harvey W. George ....	239,906	45	49
F. C. Glenn .....	300,723	52	42
E. F. Miller .....	239,900	39	19
Frank Hagan .....	130,682	(54 dealers)	**
Ellwood E. Kieser.....	420,788	40	116
Edward Parris .....	160,100	(61 dealers)	**
Goodyear Store .....	None	2	4
(Jenkintown)			
Goodyear Store .....	None	8	1
(Norristown)			
	<hr/> \$1,535,944		

\* Includes some duplication due to 11 lessee dealers and 5 contract dealers having two alternate sources of supply.

\*\* No breakdown is available as to the numbers of lessee and contract dealers, respectively, supplied by these two supply points. Mr. Hagan was supply point to a total of 54 lessee and contract dealers of Atlantic, and Mr. Parris to a total of 61 lessee and contract dealers of the oil company.

Witness Elmer H. Booz, for example, an Atlantic lessee dealer from 1952 until 1956, testified that Mr. Edward Parris was the designated Goodyear TBA supply point for dealers in his area. He stated that although he could have purchased Goodyear tires from other dealers at lower prices than from Mr. Parris, that he nevertheless obtained about 85 percent of his TBA requirements from Mr. Parris. One

competing Goodyear dealer offered tires to Mr. Booz at a discount from list price of 10 percent plus 5 percent, plus 2 percent whereas Mr. Parris gave only a 10 percent discount, plus 2 percent discount for cash.

As to competing brands of tires, Mr. Booz testified that he could make more profit on several such brands than he could on Goodyear tires. Lee tires were available at a discount from list price of 10 plus 10 plus 10 percent, plus 2 percent for cash. Moreover, the witness stated that he could never resell Goodyear tires at list price because "there is always someone from the Goodyear company or somebody else that is going to knock you down on it."<sup>13</sup>

Witness Francis J. Balloran commenced operating an Atlantic station in 1953 and was a contract dealer for Atlantic at the time he testified in this proceeding. He stated that after becoming an Atlantic dealer he purchased Goodyear TBA from his designated supplier, Mr. E. F. Miller (Table V, supra):

Q. Now, you stated that the Goodyear TBA was furnished by Mr. Miller? A. That's right.

Q. Why did you buy your Goodyear TBA from Mr. Miller? A. Well, that was the setup by the Atlantic Refining Company when I first operated the business.

Q. Was it a matter of your own choice? A. No, sir.

Q. Did you want to purchase TBA from Mr. Miller? A. Not truthfully, no.

Q. Why didn't you? A. Half the time when you called up you couldn't get it. Half the time you called up he didn't have it. If he did, you had to

<sup>13</sup> When Atlantic was considering adopting the Goodyear TBA program an intracompany memorandum recognized that Atlantic dealers would face "... a maximum amount of competition from established dealers and company stores, because it is reported that every county, marketing town and shopping center now has a Goodyear store or distributor."



send a man with a truck and waste an hour and a half to go pick it up and bring it back.

Q. Could you have purchased Goodyear tires at a cheaper price in the area? A. Yes, sir.

Q. What was the name of the supplier? A. Hires and Rocher.

Witness Balloran also testified that he occasionally purchased brands of tires other than Goodyear, but did not display them openly:

Q. Did you purchase U. S. tires from Harris and Leonard? A. That's right.

Q. Were such tires advertised, U. S. tires? A. Not out of my place they weren't.

Q. Where did you keep such tires? A. Back on the racks, back on the old racks where they couldn't be seen.

Q. Seen by whom? A. Any of the Atlantic men that came in there, the bosses.

Q. Did you purchase Lee tires? A. Yes, sir.

Q. And where did you keep them? A. On the racks, sir...

Nineteen witnesses representing eleven TBA wholesale suppliers in the Philadelphia-Suburban District engaged in competition with one or more of the six Goodyear supply points named in Table V, *supra*, testified in support of the complaint. Without exception, these witnesses gave evidence that they were able to sell little or no TBA products to Atlantic dealers in their areas, and that such Atlantic dealers had stated that they must purchase their TBA needs from one or more of the designated Goodyear supply points listed in Table V.

Witness Michael T. Lanza, partner in the Philadelphia firm of Lanza Tire Service, stated that his company sells Goodyear and Firestone tires and tubes, as well as other brands, and also Exide batteries. He further stated that

there are from 45 to 60 Atlantic service stations in his sales area, and that all such stations stock and advertise Goodyear tires and batteries. Witness Lanza identified Messrs. Fred Glenn and Harvey George as Goodyear TBA suppliers to Atlantic service stations in the North Philadelphia marketing area of Lanza Tire Service.

Witness Glenn L. Wetzel, President of Chester Auto Parts, Inc., of Chester, Pa., testified that his company sells Willard batteries, Dayton Rubber Co. fan belts and radiator hose, AC, Purolator and Fram oil filters, and a wide assortment of automotive waxes, polishes and cleaners in competition with other sellers of TBA in his company's marketing area, including Mr. Edward Parris. Witness Wetzel stated that it is "rather futile" to attempt to sell automotive batteries to Atlantic dealers, and "very difficult" to sell automotive accessories to them. On cross-examination he was asked this question:

Q. Did I understand you to say that you don't sell any TBA items to Atlantic stations now? A. Selling and buying are two different categories. They buy from me one or two filters to carry them over until Ed Parris can deliver them a case. They buy six or eight cans of merchandise to carry them over until Ed Parris can deliver a case or two cases or five cases, whatever the deal may be.

Witness Myer Duboff is an outside salesman for Lancaster Auto Supply Company of Philadelphia. This firm competes with Goodyear dealers Frank Hagan, E. F. Miller and Ellwood Kieser, *supra*. TABLE V. Witness Duboff testified that he had solicited the business of about 35 Atlantic stations in his area, all of which advertise Goodyear products "... right down the line." He stated that he had been told by a number of Atlantic dealers that they were unable to buy TBA items from him because they "must buy from the company." On cross-examination he was queried as to statements made to him by one Atlantic dealer:

Q. You mentioned one person, Mr. I. Mann, of Haverford and Brookhaven Road? A. That is right.

Q. As having said something to you about inability to buy from you. I am not clear as to what he said. A. Do you want me to state what he said to me. He said to me. "I can't buy from you."

Q. Had he been buying from you? A. He was buying odds and ends and every time he come in to sell him, he would have to hide things, you would think it was the Gestapo or something. I would go in to see him and talk to him and he would say "Mike, I can't buy from you," and I said "Why not," and he says "They know what I am doing," and I didn't think that was right.

Many other examples of such testimony could be cited, not only by former Atlantic dealers and by TBA suppliers from the Philadelphia area, but from other marketing areas of Atlantic as well. These facts are clear: Atlantic has allocated three of its six marketing regions to Firestone and the other three to Goodyear. Firestone's sales to Atlantic outlets amounted to \$5,562,936 in 1955, the last full year for which data are available, and in the same year the rubber company paid commissions amounting to \$506,199 to Atlantic. Goodyear's sales to Atlantic outlets amounted to \$5,700,121 in 1955 and its sales commission payments to the oil company totalled \$557,559.

We find that Atlantic has used its power as a major wholesale and retail distributor of gasoline and as a lessor of numerous valuable retail gasoline distribution facilities to cause its dealers to purchase very substantial amounts of a different class of products, TBA. This finding, in conjunction with Atlantic's market position and the volume of TBA affected, would appear to bring this case within the Supreme Court's ruling in *Northern Pac. Ry. Co. v. United States*, 356 U. S. 1 (1958) and the more recent decision by the Fourth Circuit in *Osborn v. Sinclair Refining Co.*, F. 2d (4th Cir. 1960). [\*]

The Court held in the *Northern Pacific* case that tying arrangements are *per se* violative of Section 1 of the Sherman Act "... whenever a party has sufficient eco-

[\* This case now is reported at 286 F. 2d 832 (4th Cir. 1960), cert. denied, 366 U. S. 963 (1961).]

conomic power with respect to the tying product to appreciably restrain free competition in the tied product and a 'not insubstantial' amount of interstate commerce is affected" (356 U. S. at 6). The content of the phrase "sufficient economic power" with respect to the tying product was defined by the Fourth Circuit recently in the *Osborn* case.

Osborn was a lessee of Sinclair Refining Company from 1936 to 1948, at which time his lease was terminated and a new lease entered into which was continued until May 1956, when it was finally cancelled by Sinclair. During the years of Osborn's tenure as a Sinclair dealer, the oil company or its subsidiary, Sherwood Bros., Inc., was party to a sales commission contract with Goodyear in all material respects identical to the Goodyear-Atlantic and the Firestone-Atlantic arrangements in the instant case. Osborn filed suit for treble damages under the Sherman Act, claiming that the sale of Goodyear TBA to Sinclair dealers in Maryland was in furtherance of an illegal restraint of trade. On appeal, the court held that Sinclair had gone beyond mere salesmanship in inducing its dealers to carry substantial quantities of Goodyear TBA if they wished to continue selling Sinclair gasoline under their lease and sales agreements with Sinclair.<sup>14</sup> As phrased by the court, quoting its own earlier decision in *McElhenny v. Western Auto Supply Co.*, 268 F. 2d 332, 338 (4th Cir. 1959):

"Probably nothing is more firmly settled in our antitrust jurisprudence than that an illegal contract may be inferred from all the circumstances."

According to the court, Sinclair had violated Section 1 of the Sherman Act through a series of *implied* tie-in agreements with its dealers in Maryland. Moreover, the court did not regard it as significant that Sinclair had not

<sup>14</sup> Sinclair did not have a sales commission plan in effect throughout its entire marketing area, but only in Maryland and, to some extent, in adjacent states. [286] F. 2d [832] at [834]. Osborn, plaintiff in the case discussed above, testified in the instant proceeding as a witness in support of the complaint.

required its dealers to purchase all their requirements of TBA from Goodyear:

"To insist upon such exclusivity in a tie-in would be inconsistent with the trend of decisions in this area. If a substantial amount of commerce is restricted by such arrangements, the standard for illegality would seem to have been met."

As to the requirement of "sufficient economic power" in the tying commodity—Sinclair's position in the petroleum retail market—the court found that in 1956, Sinclair had operated about 300 out of some 2300 retail service stations in Maryland and that those stations had sold about 10 percent of the total sale of gasoline in the same state in that year. This was held to afford Sinclair sufficient economic power in the gasoline market appreciably to restrain commerce in TBA. No one questioned the finding that Goodyear TBA purchased by Sinclair dealers in Maryland comprised a substantial amount of commerce. Accordingly, the implied tie-in agreements between Sinclair and its dealers were held to constitute a *per se* violation of the Sherman Act.

Here we find that Atlantic, which describes itself as "... a large producer and distributor of petroleum products" whose operating revenue "totalled more than one half billion dollars" in 1954, distributes gasoline directly to more than 5,500 retail service stations and through wholesale distributors to more than 2,800 additional service stations in 17 states along the Atlantic Seaboard. Approximately 81 percent of Atlantic's total sales of gasoline in 1955 were accounted for by these approximately 8,300 retail service stations.

But we do not rest our decision on a mechanical application of the rule of the *Northern Pacific* and *Osborn* cases. The issue here is the legality of respondents' use of a *particular method* of distributing TBA products. Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase



substantial quantities of sponsored TBA even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic. Determination of illegality in this context requires an evaluation of competitive effects resulting from the sales commission method of distributing TBA used by these respondents.

The record of this case conclusively establishes, in our minds, that the sales commission contracts between Atlantic and Goodyear and Atlantic and Firestone have unlawfully injured competition in the distribution of TBA at the manufacturing, wholesale and retail levels. Firestone dealers are foreclosed from Atlantic outlets in regions assigned to Goodyear, and Goodyear dealers are foreclosed from Atlantic outlets in regions assigned to Firestone. Even within regions assigned to Goodyear, or to Firestone, only those Goodyear or Firestone dealers fortunate enough to be nominated as "supply points" have any prospect of sales to Atlantic dealers. Wholesale TBA dealers representing other tire manufacturers, for example United States Rubber Company, Lee Rubber and Tire Corporation, and Mansfield Tire and Rubber Company testified to their inability to sell tires to Atlantic service station dealers, except upon an occasional "pick-up" basis when a motorist demands a tire brand other than the locally-sponsored offering available at the station.

Battery manufacturers and certain accessory suppliers are, if possible, even more severely disadvantaged by the sales commission system than are tire companies competing with Firestone and Goodyear. Local wholesale distributors of Exide, Willard, Bowers and other brands of batteries testified to their inability to sell batteries to Atlantic stations except upon a pick-up basis. The most shocking feature of the sales commission system as to batteries, however, is the fact that the sales commission contracts with Atlantic enable Goodyear and Firestone to exclude *their own suppliers of batteries* from the wholesale and retail markets represented by Atlantic service station outlets. For the evidence of



record indicates that Goodyear and Firestone both refused to execute sales agreements relating only to tires and tubes, but insisted that it include *all* TBA items sold by them or none. An analogous situation exists as to certain accessory products, for example, "Mac's" brand of polishes, waxes, and cleaners.

Moreover, as one of the chief characteristics of the sales commission plan is that it strengthens wholesale distributors of Goodyear and Firestone by pre-empting for their benefit a substantial segment of all of the various local wholesale TBA markets in Atlantic's marketing area, the sales commission system stands as a bar to the *expansion* by smaller TBA manufacturers of their own distributive organizations. As respondents concede, a substantial proportion of all replacement TBA items sold to motorists are accounted for by service stations and "service stations, . . . constitute a large and increasingly important market" for TBA products. Thus, the competitive dislocations engendered by the sales commission plan at the wholesale level extend backward to the manufacturing level.

Finally, the unfair competitive advantages resulting from the sales commission plan are not confined to the manufacturing and wholesale levels—they extend forward to the retail level as well. Many of the wholesalers who testified in this proceeding *also* sell at retail, directly to motorists. To the extent, therefore, that suppliers of TBA competing with distributors of Goodyear and Firestone at the wholesale level are weakened by the operation of the sales commission system, the dealers are also weakened at the retail level, in instances where they are engaged in retail as well as wholesale operations.

Counsel for Atlantic contend, however, that no competitive consequences attend the sales commission plan which did not characterize the purchase-resale program employed by Atlantic prior to 1951. This point deserves consideration since it implies that no useful purpose would be served by outlawing the sales commission plan between Goodyear and Atlantic as Atlantic would merely return to the purchase-resale method of distributing TBA, with the result that

Goodyear and Firestone dealers would lose a substantial volume of sales, but without improving the lot of competing TBA suppliers as they would still be unable to sell TBA to Atlantic dealers. We believe this argument to be without merit for several reasons.

First of all, what course of action Atlantic may follow with respect to TBA if the sales commission plan is outlawed is entirely speculative. Assuming for the moment, however, that Atlantic will return to the purchase-resale plan and flout the antitrust laws by requiring its dealers to handle Atlantic TBA exclusively, or even substantially,<sup>15</sup> it is obvious that local wholesalers of TBA competing with Firestone and Goodyear dealers in Atlantic's marketing area will at least no longer be laboring under the handicap of their competitors representing Firestone and Goodyear having already pre-empted a substantial share of the local wholesale TBA market. As the situation stands under the sales commission plan, local dealers representing Firestone and Goodyear are assured of a substantial chunk of the market before the competitive race at the wholesale level even begins. (See Table V., supra) Abolition of the sales commission system will at least ferminate the unjust advantage presently enjoyed by distributors of Firestone and Goodyear over local competitors representing other tire manufacturers and TBA suppliers.

Not only do the competitive effects of the sales commission plan differ from those of the purchase-resale plan at the wholesale level, but at the manufacturing level as well. When Atlantic was considering changing from the purchase and resale of Lee tires and Exide batteries to some other method of merchandising TBA, it contacted several of the larger tire and rubber companies, including Goodyear, Firestone, The B. F. Goodrich Company, United States Rubber Company and General Tire and Rubber Company inquiring "... what interest you may have in the sale

<sup>15</sup> Cf., *Standard Oil Co. v. United States*, 337 U. S. 293 (1949); *Northern Pac. Ry. Co. v. United States*, supra; *Osborn v. Sinclair Refining Co.*, supra; *United States v. Sun Oil Co.*, 176 F. Supp. 715 (E. D. Pa. 1959).

of your tires and tubes through Atlantic accounts." Proposals were requested not only as to principal brands of these manufacturers, but as to secondary brands controlled by them and private brands as well. At the same time, Atlantic also contacted Mansfield Tire and Rubber Company and Lee Rubber and Tire Corporation soliciting proposals from them to furnish a private brand tire to Atlantic. This suggests that the smaller tire companies are able to compete with their smaller competitors in selling tires to oil company accounts on a purchase and resale basis. The evidence also shows, however, that the smaller tire companies are *unable* to compete with larger tire manufacturers for the business of oil companies using the sales commission plan *because the smaller tire companies lack distribution facilities which blanket the entire sales area of a major marketing oil company desiring to adopt the sales commission plan.* This was established by the testimony of Vice-President Colley of Atlantic, who appeared as a witness on behalf of this respondent.

A major oil company's decision to adopt the sales commission method of distributing TBA thus inaugurates a vicious cycle of injurious competitive effects: smaller tire and rubber companies are unable to compete in the first instance for the business of the oil company desiring to adopt a sales commission plan because they lack widespread distribution facilities at the wholesale and resale levels; and yet the operation of the sales commission plan stands as a bar to future expansion of the smaller tire companies' distributive systems since they are thereby foreclosed from a substantial segment of the wholesale and retail market *after the oil company has adopted a sales commission plan offered by a larger tire company.*

We believe that the sales commission method of distributing TBA presents a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution). Other anticompetitive effects of the sales commission system are so obvious that they require no detailed consideration. The public suffers because it cannot rely upon

competitive rivalry among local TBA wholesalers to insure that service station outlets will be able to obtain price savings which may be passed along to consumers. And, too, the system prevents the service station operator himself from using his buying power to further his own business advantage instead of that of his oil company supplier. As the Court of Appeals said in its recent *Osborn* decision, in a situation identical in its essentials with the present case, insofar as the service station dealer is concerned:

"Because of its financial interest in having its lessee-dealers sell Goodyear TBA rather than competing brands, Sherwood-Sinclair engaged in a course of conduct designed to bring about this result. The facts in this case utterly fail to reveal any business motive for the defendant's policy that its dealers should handle Goodyear products instead of others. Admittedly, it was proper for Sinclair-Sherwood to desire its lessees to carry a complete, high-quality line of TBA. It is conceded, however, that there are other competing brands, and there is no suggestion that Goodyear was superior to the other brands of TBA, or that there was any benefit to the dealers in handling Goodyear rather than one of the other lines."

Several additional points are raised by Atlantic, but we believe only one of these requires detailed consideration in this opinion. Respondent contends that it was error, violative of due process of law, for the same hearing examiner to have presided over and rendered initial decisions in both this case and in Docket 6487, The Firestone Tire & Rubber Company and Shell Oil Company. The crux of the contention seems to be that the hearing examiner could not possibly have rendered his initial decision in this case solely upon the basis of the record of the instant proceeding, since he also heard testimony and received evidence involving Atlantic's sales commission plan with Firestone in Docket 6487. As respondent puts it,

"While Atlantic has the utmost respect for the Hearing Examiner's integrity and ability, Atlantic submits that he could not humanly exclude from consideration his impression of the witnesses' demeanor and credibility in the Firestone-Shell proceedings and that his decision against Atlantic based on impressions gained in those other proceedings is a violation of due process."

Our study of the initial decision and of the record in this case indicates that there is no basis for the claim that the hearing examiner considered extra-record evidence in making his findings of fact and conclusions of law. Substantial evidence is present in the record of this case to support every finding of fact and conclusion of law by the hearing examiner. In any event, our own independent study of the record herein is the basis for the findings of fact and conclusions of law set forth in this opinion.

#### CONCLUSION

Other exceptions of respondents Atlantic and Goodyear have been considered and rejected. The appeal of respondent Atlantic is denied. The appeal of counsel supporting the complaint is granted in part and denied in part. The initial decision, to the extent that it is contrary to the views expressed in this opinion, will be modified to conform with such views. An appropriate order will be entered.

March 9, 1961.



**Commission's Order.**

**UNITED STATES OF AMERICA**

**BEFORE**

**FEDERAL TRADE COMMISSION**

**Commissioners:**

**EARL W. KINTNER,**  
*Chairman*

**ROBERT T. SECREST**  
**SIGURD ANDERSON**  
**WILLIAM C. KERN**

**IN THE MATTER**

*of*

**THE GOODYEAR TIRE & RUBBER COM-**  
**PANY, a corporation, and**  
**THE ATLANTIC REFINING COMPANY, a**  
**corporation.**

Docket 6486

**FINAL ORDER**

Counsel supporting the complaint and respondent The Atlantic Refining Company having filed cross-appeals from the hearing examiner's initial decision in this proceeding; and

The Commission having considered said appeals, including the briefs and oral arguments of counsel and the entire record, and having rendered its opinion denying the appeal of respondent The Atlantic Refining Company and granting in part and denying in part the appeal of counsel supporting the complaint, and having determined that the initial decision should be modified in certain respects:

IT IS ORDERED that the findings and conclusions of the initial decision be, and they hereby are, modified and sup-



plemented to conform with the findings, conclusions and views set forth in the accompanying opinion of the Commission

IT IS FURTHER ORDERED that the following be, and it hereby is, substituted for the order contained in said initial decision:

IT IS ORDERED that respondent The Atlantic Refining Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the promotion, or offering for sale, or sale and distribution of tires, inner tubes, batteries, and automotive accessories and supplies (hereinafter referred to as "TBA products") in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

1. Entering into or continuing in operation or effect any contract, agreement or combination, express or implied, with The Goodyear Tire and Rubber Company, or The Goodyear Tire & Rubber Company, Inc., or with any other rubber company or tire manufacturer, or any other supplier of tires, batteries, and/or accessories, whereby The Atlantic Refining Company receives anything of value in connection with the sale of TBA products to any wholesaler or retailer of Atlantic petroleum products by any marketer or distributor of TBA products other than The Atlantic Refining Company;

2. Accepting or receiving anything of value from any manufacturer, distributor, wholesaler, or other vendor of TBA products, for acting as sales agent or for otherwise sponsoring, recommending, urging, inducing, or promoting the sale of TBA products, directly or indirectly, by any such vendor to any wholesaler or retailer of Atlantic petroleum products;

3. Using or attempting to use any contractual or other device, such as, but not limited to, agreements,

leases, training programs, promotions, dealer meetings, dealer discussions, service station identification, credit cards, and financial loans, to sponsor, recommend, urge, induce, or otherwise promote the sale of TBA products by any distributor or marketer of such products other than The Atlantic Refining Company to or through any wholesaler or retailer of Atlantic petroleum products;

4. Employing any method of inspecting, reporting, or surveillance or using or attempting to use, in any manner, its relationship with Atlantic outlets to sponsor, recommend, urge, induce, or otherwise promote the sale of any specified brand or brands of TBA products by any distributor or marketer of such products other than The Atlantic Refining Company to any wholesaler or retailer of Atlantic petroleum products;

5. Intimidating or coercing or attempting to intimidate or coerce any wholesaler or retailer of Atlantic petroleum products to purchase any brand or brands of TBA products;

6. Preventing or attempting to prevent any wholesaler or retailer of Atlantic petroleum products from purchasing and reselling, merchandising, or displaying TBA products of his own independent choice.

It Is FURTHER ORDERED that respondents The Goodyear Tire and Rubber Company, and The Goodyear Tire and Rubber Company, Inc., (hereinafter collectively referred to as "Goodyear"), corporations, and their officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the promotion, offering for sale or sale and distribution of tires, inner tubes, batteries and automotive accessories and supplies (hereinafter referred to as "TBA products") in commerce, as "commerce" is defined in the Federal Trade Commission

Act, do forthwith cease and desist from, directly or indirectly:

1. Entering into or continuing in operation or effect any contract, agreement or combination, express or implied, with The Atlantic Refining Company or with any other marketing oil company whereby Goodyear, directly or indirectly, pays or contributes anything of value to any such marketing oil company in connection with the sale of TBA products by Goodyear or any distributor of Goodyear products to any wholesaler or retailer of petroleum products of such marketing oil company;

2. Paying, granting or allowing, or offering to pay, grant or allow, anything of value to The Atlantic Refining Company or to any other marketing oil company for acting as sales agent or for otherwise sponsoring, recommending, urging, inducing or promoting the sale of TBA products, directly or indirectly, by Goodyear or any distributor of Goodyear products to any wholesaler or retailer of petroleum products of such marketing oil company;

3. Reporting or participating in the reporting to The Atlantic Refining Company or any other marketing oil company concerning sales of TBA products to wholesalers or retailers of petroleum products, individually or by groups, of any such marketing oil company.

IT IS FURTHER ORDERED that the initial decision as so modified and supplemented be, and it hereby is, adopted as the decision of the Commission.

IT IS FURTHER ORDERED that respondents The Atlantic Refining Company, The Goodyear Tire and Rubber Company, and The Goodyear Tire and Rubber Company, Inc., corporations, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in

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which they have complied with the aforesaid order to cease and desist.

By the Commission.

[SEAL]

/s/ ROBERT M. PARISH,  
*Secretary.*

ISSUED: March 9, 1961.

IN THE  
UNITED STATES COURT OF APPEALS,  
FOR THE SEVENTH CIRCUIT.

Nos. 13339 AND 13340.

SEPTEMBER TERM, 1963. JANUARY SESSION, 1964.

THE GOODYEAR TIRE & RUBBER COM-  
PANY,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

THE ATLANTIC REFINING COMPANY,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Petitions to  
Review  
and Set Aside  
Order of  
the Federal  
Trade  
Commission.

April 24, 1964.

Before SCHNACKENBERG, CASTLE, and SWYGERT, *Circuit Judges*.

SWYGERT, *Circuit Judge*. The Goodyear Tire & Rubber Company and the Atlantic Refining Company request a review of the Federal Trade Commission order based upon a complaint charging a violation of section 5 of the Federal Trade Commission Act<sup>1</sup> and which challenged the legality

<sup>1</sup> Federal Trade Commission Act §5(a)(1), 66 Stat. 632 (1952), 15 U. S. C. §45(a)(1) (1958), reads as follows:

Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are declared unlawful.

of distribution of tires, batteries, and automobile accessories (TBA) to service stations under a sales commission agreement between petitioners.

Goodyear is an Ohio corporation engaged in the manufacture, sale, and distribution of rubber products, including tires and inner tubes. It is the largest manufacturer of these products in the United States.

Atlantic, a Pennsylvania corporation, is a major producer, refiner, and distributor of gasoline and other petroleum products. It markets its products in seventeen states along the eastern seaboard.

The complaint issued by the Commission alleged that Atlantic produces and sells petroleum in commerce to wholesale distributors, automobile service stations, and others; that the distributors and retailers, ostensibly independent, nevertheless, are under the domination and control of Atlantic; that Goodyear and Atlantic entered into a sales commission contract whereby Atlantic agreed to promote the sale of Goodyear products, that is, tires, batteries, and accessories (TBA); to Atlantic's distributors and service station dealers located in a part of Atlantic's sales territory; that Atlantic had a similar contract with Firestone Tire & Rubber Company for the balance of Atlantic's territory; and that Goodyear had similar contracts with a number of other oil companies which, like Atlantic, dominate and control their distributors and service station dealers. The complaint further alleged that Atlantic is paid a sales commission by Goodyear and Firestone on their products which are sold by Atlantic's distributors and service station dealers. The complaint charged that by the use of the sales commission agreement and the practices of the two companies thereunder, Atlantic and Goodyear have restrained competition in the sale of TBA, and committed unfair acts and practices proscribed by section 5 of the Federal Trade Commission Act.

The hearing examiner dismissed the complaint against Goodyear, upholding the legality of the sales commission contract, but found that Atlantic had violated section 5 of



the act by forcing a substantial number of its dealers to purchase Goodyear TBA. The examiner's order against Atlantic prohibited future actions of coercion.

Both Atlantic and general counsel for the Commission appealed from the examiner's ruling. The Commission sustained the examiner's finding that Atlantic had coerced its dealers to purchase sponsored TBA but held that the coercion was symptomatic of a more fundamental restraint of trade, inherent in the sales commission plan itself. The Commission said that the principal issue raised by the complaint was the legality of the Goodyear-Atlantic contract. It noted, however, that Atlantic had a similar agreement with Firestone and that Goodyear had like agreements with a number of oil companies other than Atlantic.

The Commission determined that the sales commission method of marketing TBA is "a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)." It found that Atlantic, which sells gasoline, has used its economic power over its dealers to cause them to carry substantial amounts of a different product, TBA; also, that the effects of the sales commission system are anticompetitive at the manufacturing, wholesale, and retail levels. It found that Goodyear's manufacturing competitors have been substantially precluded from selling TBA to the Atlantic service stations assigned to Goodyear; that wholesalers of TBA have also been substantially precluded from selling to Atlantic's service stations; that Goodyear wholesalers who are not supply points have been similarly restricted; and that Atlantic service station dealers have been restrained in marketing nonsponsored TBA. Finally, the Commission found that the public has suffered because lack of competition among the service stations' suppliers of TBA has precluded the possibility of price reductions to the consumer.

The Commission based these conclusions on the components of the sales commission system which include advance notice to Goodyear and Firestone of the selection of new dealers by Atlantic, training schools for Atlantic

dealers in which Goodyear and Firestone TBA are used in demonstrations, sales solicitation by Atlantic salesmen of sponsored TBA from dealers, double teaming, use of a reporting technique whereby the tire company reports to Atlantic the TBA purchases of each dealer, Atlantic's recommendation to each dealer of a minimum Goodyear or Firestone TBA inventory, and Atlantic's assistance in advertising, and providing credit card facilities for the sale of sponsored TBA.

Upon finding the sales commission system an unfair method of competition, the Commission revised and expanded the examiner's order. The order of the Commission not only prohibits Atlantic from coercing its distributors and dealers to purchase a particular brand of TBA but also forbids its participation in any sales commission arrangement for the distribution of TBA. Further, the order prohibits Goodyear's participation in any sales commission arrangement with Atlantic or any other oil company for marketing its TBA.

Upon a consideration of the record as a whole, we conclude there was substantial evidence to support the Commission's ultimate findings and conclusions and that its order should be affirmed in all respects.

To narrate all relevant facts would extend our discussion unduly; we undertake a summary.

#### *Atlantic's Operations.*

Atlantic has three major kinds of customers: wholesale distributors, retailers, and commercial accounts; the last class was not involved in the administrative proceeding.

Wholesale distributors maintain their own storage facilities and resell Atlantic's products under its brand names to their retail customers, including service stations. In 1956 there were 236 Atlantic distributors selling to 2,897 service stations.

Retail dealers who purchase directly from Atlantic are of two classes; lessee-dealers, that is, service station operators who do not own their stations; and contract dealers,

station operators who own their stations or lease from parties other than Atlantic, or operate garages, grocery stores, and similar establishments. The company had 5,537 direct retail dealers in 1956. Lessee-dealers accounted for approximately thirty-nine per cent of Atlantic's total gasoline sales in 1955 and the contract dealers eighteen per cent.

The usual lease between Atlantic and its lessee-dealers provides for a one year term with automatic renewal from year to year unless written notice is given before the expiration of any term. When the lease is executed the dealer is required to sign an "Eleven Point Lease Letter" which prescribes operational standards for the service station. These include housekeeping, use and upkeep, display, illumination, personnel, hours of operation, services, adequate inventory, sales promotion, prices, and accounting. The standards are enforced by Atlantic through the surveillance of its sales personnel and so-called "phantom customer inspectors."

The Commission found that the eleven point letter is an integral part of the lease; that Atlantic at its option may terminate the lease in the event of its breach; and further, if a dealer violates any of the requirements of the letter, he is warned that the lease will be cancelled unless the noncompliance is remedied within fifteen days.

Atlantic adopted a policy in 1953 providing that any lessee-dealer who establishes a two year record of satisfactory operation is eligible for a three year lease. Moreover, Atlantic after 1953 no longer required its dealers to purchase Atlantic products except lubricants. The record shows, however, Atlantic's dealers handle its products exclusively.

In 1956 fifty per cent of the 3,044 Atlantic contract dealers operated service stations; the others operated grocery stores, garages, and similar outlets (outlets other than service stations ordinarily do not handle TBA).

Although contract dealers do not lease their stations from Atlantic, they usually enter into two kinds of agreements with the company, one providing for loans of station equipment and the other for the purchase of a minimum

amount of gasoline. The loan agreements for equipment provide that Atlantic will install but the dealer must maintain the equipment (gasoline pumps, storage tanks, signs, compressors, etc.). The agreements ordinarily are for a one year term but may be terminated by notice of either party at the end of the original or any subsequent term. Atlantic may repossess its equipment upon termination of the contract; however, if the agreement is cancelled because of a breach by the dealer, Atlantic requires him to pay both the cost of installation and removal of the equipment or Atlantic has the option to leave the equipment and require him to pay for it.

Atlantic makes the same type of contract with its wholesale distributors for the purchase of gasoline as required of its contract dealers. The company, moreover, reserves the right to change the service stations' source of supply from Atlantic itself to its distributors.

#### *Goodyear's Operations.*

Goodyear has tire factories in five states. It also has fifty-seven warehouses from which its tires and the accessories it markets are distributed to wholesale and retail outlets. The batteries which Goodyear sells are distributed directly by the companies manufacturing them.

Goodyear operates approximately 500 company owned wholesale-retail stores throughout the United States. It also has more than 12,000 independent franchised dealers as well as a number of unfranchised dealers; both sell at wholesale and retail.

#### *TBA.*

TBA is an integral part of service station operations. Dealers must carry it in order to give complete service to motorists and to operate their stations at a profit. There are a large number of TBA items available to dealers, and there are constant changes and production developments in TBA of which the dealers must be trained and kept informed. Every major oil company offers some kind of

TBA program to give training and advice to its service station dealers.

*Atlantic's Purchase-Resale Plan.*

For a number of years before Atlantic entered into sales commission contracts with Goodyear and Firestone, it merchandised TBA under a plan known as "purchase-resale."

Under this plan the oil company sells to its dealers at wholesale TBA products which it has purchased and warehoused. The products are merchandised either under the labels of various manufacturers or under the oil company's own labels. Atlantic under its purchase-resale plan bought Lee tires from the Lee Tire and Rubber Corporation, Exide batteries from the Electric Storage Battery Company, and various accessories from other suppliers, and sold these products to its wholesale distributors and retail dealers. Between 1948 and 1950 Atlantic's sales of TBA to its distributors and dealers amounted to \$22,000,000.

Atlantic became increasingly dissatisfied with the purchase-resale plan. It asserts that outside of the Philadelphia area the ready availability of Lee tires diminished and it could not give good delivery on batteries or keep them properly charged. It asserts further, that its warehouses were unsuited for handling accessories, and it was difficult to maintain an adequate supply of TBA to meet the demands of its dealers.

In 1948 and 1949 Atlantic conducted a survey of its dealers to determine their preferences of brands, sources of supply, and other aspects of TBA marketing. Sixty-seven per cent of the dealers interviewed preferred Lee tires and seventy-nine per cent preferred Exide batteries over competing brands. Only eleven per cent preferred carrying Goodyear tires and four per cent Firestone. A majority preferred to purchase their TBA from more than one source because of price advantage and variety of brands. Nevertheless, Atlantic, after conducting experiments under sales commission arrangements with both Firestone and Goodyear, entered into sales commission



contracts with these companies, effective March 1, 1951, covering its entire marketing area and assigning a portion of its sales territory to each company.

While negotiating the Goodyear and Firestone contracts, Atlantic asked certain battery manufacturers whether they would offer a program similar to that of Goodyear or Firestone. Several manufacturers indicated an interest. However, both Goodyear and Firestone said they would refuse to sell only tires under the sales commission plan and insisted that they be allowed to handle batteries and accessories as well as their own products.

In order to effect the transition to the new plan, Atlantic held numerous meetings with its dealers at which its own representatives and those of Goodyear or Firestone explained the new program. The dealers were told that the plan was a change in company policy; that Atlantic wanted them to carry Goodyear or Firestone TBA rather than Lee tires and Exide batteries and that the switch would be to the dealers' benefit. Letters were also sent to the dealers advising them of the availability of the new TBA program and urging them to take advantage of it. A Goodyear representative commented on the arrangement with Atlantic, "After years of courtship Atlantic and Goodyear have wed," and "We welcome wholeheartedly this merger."

To commence the plan, Atlantic gave Goodyear and Firestone the names of its dealers in their respective territories so that their advertising could be installed at the service stations. Under Atlantic's policy this meant that only Goodyear or Firestone identifications were to be displayed at Atlantic stations. Atlantic salesmen accompanied either by Goodyear or Firestone salesmen contacted the dealers concerning the change-over to sponsored TBA, and Atlantic received progress reports from Goodyear and Firestone. The reports included the names of dealers who refused to permit the installation of Goodyear or Firestone signs.

Within nine months after the sales commission system was inaugurated, Lee and Exide lost seventy-five per cent



of their Atlantic sales notwithstanding the dealers' previous indication of a preference for these products. By October, 1951 ninety-seven per cent of Atlantic's New England region dealers and ninety-six per cent of its New York region dealers had signed with Goodyear. Firestone also signed virtually all the Atlantic dealers in its territory.

### *The Sales Commission System.*

The sales commission contract between Goodyear and Atlantic and the contract between Firestone and Atlantic are similar. Under the contracts, Atlantic assigned to Goodyear its New England, New York, and Philadelphia-New Jersey marketing regions and to Firestone its eastern Pennsylvania, western Pennsylvania, and southern regions.

By the terms of the Goodyear contract, Atlantic receives a commission on all Goodyear TBA sold to Atlantic dealers in the territory assigned to Goodyear in return for Atlantic's efforts and cooperation in promoting the sale of Goodyear TBA to those dealers. Atlantic's contractual assistance to Goodyear includes continuous efforts, suggestions, and counseling its dealers that they maintain adequate Goodyear stock, joint calls with Goodyear salesmen upon the dealers, and the institution of a dealer TBA training program.

An important part of the Goodyear contract is the assignment of each Atlantic dealer to a specific supply point designated by the tire company. The supply point is a TBA wholesaler who may be a Goodyear company operated store, a franchised Goodyear dealer, or an Atlantic service station dealer or distributor who at the same time is a franchised Goodyear wholesaler. Atlantic receives ten per cent commission<sup>2</sup> on all purchases of Goodyear TBA made by its retail dealers from the tire company's

<sup>2</sup> Although termed a sales commission contract, the payments to Atlantic are not commissions on sales made by it but are override payments on sales made by Goodyear supply points to Atlantic's dealers.

supply points and seven and one-half per cent on purchases by Atlantic's wholesale distributors.

When Atlantic selects a new retail dealer, at least three separate interviews are held with the applicant at which the sales commission program with Goodyear is explained. The dealer is told that most Atlantic stations in the Goodyear territory are identified "Goodyear" and that it would be to his advantage to carry that company's products. When an applicant is selected but before he is given a lease, he attends an Atlantic training school where extensive discussions and demonstrations of Goodyear TBA are conducted. Atlantic's sponsorship of Goodyear TBA is explained. The prospective dealer is told what Goodyear inventory he should carry and that he should use approved Goodyear signs, decals, and advertising mats. Goodyear is advised of the opening of the applicant's station, and the new dealer is informed of the Goodyear supply point to which he has been assigned.

Atlantic establishes TBA quotas for its dealers which are considered "an agreed upon obtainable objective." Goodyear reports to Atlantic the monthly purchases of its products by each Atlantic dealer. This procedure enables the oil company to check on the dealers' progress in selling sponsored TBA and also serves as an accounting method for ascertaining the sales upon which Goodyear pays Atlantic its commission.

Atlantic salesmen police the dealers' contractual obligations with the oil company by contacting the dealers regularly. It is the salesman who makes the initial recommendation whether a dealer's lease or contract is to be renewed. Atlantic salesmen not only promote the sale of their own company's products but also Goodyear TBA; they help plan sponsored TBA promotions, they write up TBA orders, and they check the dealer's books to ascertain whether nonsponsored TBA has been purchased.

Under the sales commission system, the dealers are visited regularly by a Goodyear salesman accompanied by an Atlantic salesman. Goodyear considers "double team-

ing" an effective means of selling its TBA. This duality of sales effort is continued at dealer meetings by the presence of representatives of the tire company and the oil company.

Atlantic reserves control over the advertising and identification that may be displayed at its service stations. Its policy is that only sponsored TBA identification should be displayed. Moreover, Atlantic credit cards include TBA. From 1951 to 1953 the credit card facility was limited in Goodyear territory to Goodyear TBA.

The Supreme Court in *F. T. C. v. Cement Institute*, 333 U. S. 683, 693 (1948), indicated that the Federal Trade Commission Act grants "the Commission and the courts . . . adequate powers to hit at every trade practice then existing or thereafter contained, which restrained competition or might lead to such restraint if not stopped in its incipient stages." The Commission has a latitude of flexibility within which it can restrain any new unfair method of competition "which the ingenuity of competitors may devise."<sup>3</sup>

Unfair methods of competition proscribed by section 5 of the Federal Trade Commission Act cannot be classified rigidly into categories of business methods that stifle competition. Labeling at times is more harmful than helpful in formulating conceptions that correspond with reality.

Although petitioners contest the view of the general counsel that the Commission grounded its order on the existence of an illegal tying arrangement, the Commission found that the sales commission system is, *in effect*, such an arrangement. It went on to explain, however, that because of the peculiar features of the system, it did not rest its decision on a "mechanical application of the rule of the *Northern Pacific* and *Osborn* cases."<sup>4</sup> The Commission said:

The issue here is the legality of respondents' use of a particular method of distributing TBA products.

<sup>3</sup> S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914).

<sup>4</sup> *Northern Pac. Ry. v. United States*, 356 U. S. 1 (1958); *Osborn v. Sinclair Refining Co.*, 286 F. 2d 832 (4th Cir. 1960).

Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic. Determination of illegality in this context requires an evaluation of competitive effects resulting from the sales commission method of distributing TBA used by these respondents.

The heart of this case is the economic power Atlantic possesses over its service station dealers. Ostensibly, they are independent businessmen; but behind the legalistic facade of independence, there exists a servitude caused by the coercive pressures which Atlantic exerts upon its dealers. The keystone of the actual relationship between Atlantic and its dealers is the lease and the equipment loan contract with their short term and cancellation provisions. Without repeating all the components of the relationship, it is evident that the service station dealer is more of an economic serf than a businessman free to purchase the TBA of his choice. We believe the Commission, in evaluating the evidence, correctly found that if a dealer wishes to continue in good standing with the company and retain his lease or contract, it is advantageous that he carry sponsored TBA.

On the issue of coercion the examiner said:

It is clear from the record in this proceeding that the Atlantic dealers did not consider the nonforcing letter as giving to them free and unhampered authority and the blessing of Atlantic to handle whatever TBA they might see fit. Both the dealers and the Atlantic salesmen accepted this letter for what it said; namely, that the dealer at the time of the change-over and prospective dealers thereafter had the right to select or reject the TBA sales program offered by Atlantic. The prospective dealer making application for an Atlantic

station would not likely reject offhand the program submitted by Atlantic, and such rejection could very well affect his selection as an Atlantic dealer. After a dealer selected a TBA program, the Atlantic salesman insisted, and saw to it, that the dealer hewed to the line, insofar as the more important items of TBA were concerned. The salesman would be expected to insist upon the purchase of sponsored TBA, as such purchases were reflected in the commission which the salesman received.

He concluded that "coercion and pressure were used [by Atlantic] on a substantial number of dealers to induce them to purchase sponsored TBA and to discontinue the purchase or display of nonsponsored items."

The Commission affirmed the examiner's finding of coercion. It said that although the proclaimed policy of Atlantic has been to permit its dealers to carry whatever TBA they choose, the policy in practice is ignored and the dealers "have been orally advised by sales officials of the oil company that their continued status as Atlantic dealers and lessees will be in jeopardy if they do not purchase sufficient quantities of sponsored TBA."

The Commission referred in particular to witnesses representing suppliers competing with Goodyear and Firestone who testified that the dealers responded negatively to their sales efforts because the dealers felt they were required to purchase sponsored TBA. There was evidence that if the dealers purchased nonsponsored TBA, they were told by Atlantic to return it or, in any event, not to display it. There was also testimony that leases had been cancelled or allowed to terminate because dealers had purchased nonsponsored TBA.

Atlantic contends that the finding of coercion is not supported by substantial evidence. It says that the finding rests on the testimony of only thirteen dealers out of more than five thousand; that these isolated instances of "unauthorized" coercion are insufficient to establish a violation of Atlantic's "free choice policy." We disagree. The



evidence relating to overt coercive tactics, although not extensive, must be considered with the testimony of the witnesses representing competing suppliers to the effect that the dealers felt that if they did not carry sponsored TBA they risked reprisal. Also to be considered are the policing tactics of Atlantic's salesmen and the surveillance by the so-called phantom customer inspectors. Moreover, it should be noted that the examiner, in considering the testimony of the dealers who testified for Atlantic, recognized that these witnesses "were under considerable pressure because they were naturally interested in not jeopardizing the renewal of their leases."

Atlantic's contention that sporadic reprisals against dealers are an insufficient basis for finding coercion is answered in *United States v. Loew's Inc.*, 371 U. S. 38, 50 (1962). There, the Court said:

Appellants . . . make the . . . argument that each of them was found to have entered into such a small number of illegal contracts as to make it improper to enter injunctive relief. . . . We disagree. Illegality having been properly found, appellants cannot now complain that its incidence was too scattered to warrant injunctive relief.

Atlantic's power to cause its dealers to carry either Goodyear or Firestone TBA does not depend upon overt coercive methods. The totality of facts surrounding the relationship between the oil company and the dealers points to one conclusion: the oil company is able to exert sufficient economic power over its dealers so that for all practical purposes they are required to carry sponsored TBA.

Atlantic says that its influence over its dealers to purchase sponsored TBA short of force, threat, or intimidation is lawful; that it may recommend high quality TBA to its dealers; and that such action serves a legitimate business purpose in the promotion of the sale of gasoline. This would be a persuasive argument except for the dealers' economic dependency upon the oil company. In that setting,



recommendation is tantamount to command. Covert practices are as efficient as overt action. Sophisticated methods of pressuring the dealers into carrying sponsored TBA are as effectual as express covenants and open threats.

*Osborn v. Sinclair Refining Co.*, 286 F. 2d 832 (4th Cir. 1960), although a private suit under the antitrust laws, dealt with a sales commission contract similar to the one before us. Osborn, a dealer, charged that his lease was cancelled because he had not purchased sufficient quantities of Goodyear TBA. The court of appeals held that an illegal "arrangement or condition," a tie-in, existed between the oil company and its dealers which permitted the plaintiff to recover. Although the court was not specifically concerned with the legality of the Goodyear-Sinclair sales commission contract, it held that, "the Goodyear TBA was tied to the lease and the sale of the gasoline." Chief Judge Sobeloff characterized the arrangement thus:

The perniciousness of the imposed tie-in is aggravated by the fact that the defendant [Sinclair] is not even in the business of selling the tied products, but is employing its economic power in the gasoline industry to force his dealers to do business with a supplier in another industry under an arrangement that yields the defendant an extraneous revenue. The defendant in this case goes a step further than the supplier in the usual tie-in case, for here the tied product is not even handled or sold by the defendant, but it farms out to another, for a price, its coercive economic power.

We think this an apt characterization of the Goodyear-Atlantic sales commission system.

It is true that Goodyear's contract with Atlantic in itself has no tying features. Only when the contract is considered contextually with the oil company-dealer relationship and the economic power that Atlantic has over its dealers does its tying feature emerge. Manifestly, the system was designed to exploit Atlantic's created and controlled service

station market. The Commission properly, we think, decided that the system integrates Atlantic's economic power over its service station market into the Goodyear TBA distribution system, thus giving Goodyear, for a price, a captive market.

As pointed out in *McElhenney Co. v. Western Auto Supply Co.*, 269 F. 2d 332 (4th Cir. 1959), an illegal understanding (such as a tying arrangement) may be implied from a course of dealing between the parties. Here, the tying arrangement is the sales commission system operated by Goodyear and Atlantic. In its narrower aspects the system is a tying arrangement because it requires the buyer of one product, the service station dealer who purchases Atlantic gasoline, to buy another line of merchandise, Goodyear TBA. Surrender by the dealer of his freedom to choose between brands of TBA is *per se* illegal if a "not insubstantial" amount of interstate commerce is affected. *Northern Pac. Ry. v. United States*, 356 U. S. 1 (1958); *International Salt Co. v. United States*, 332 U. S. 392 (1947).

Appraising the broader aspects of the system as a tying arrangement, we think the Commission correctly determined that the system injures competition in the distribution of TBA at the manufacturing, wholesale, and retail levels. Interbrand competition for the Atlantic service station TBA market is foreclosed to Firestone in Goodyear's territory and Goodyear is foreclosed from selling to the service stations in Firestone's territory. Moreover, the record substantiates the Commission's finding that suppliers of TBA competing with Goodyear and Firestone are substantially foreclosed from selling their products to Atlantic dealers. Atlantic's service station market is fenced off so as to make it unavailable to both manufacturers and wholesalers of competing brands.

Intrabrand competition is perniciously affected. Restraint results inevitably from the designation of a single supply point for TBA sales to the Atlantic dealer. Other Goodyear wholesalers cannot compete with the supply

point dealer for the business of the Atlantic service stations in his territory.<sup>5</sup>

We are convinced that the Commission correctly analyzed the sales commission system and found, in effect, a tying arrangement inherently anticompetitive. It is anticompetitive largely because competition for the business of the individual service station is replaced by competition for the oil company's domination of its dealers.

The Commission found that service stations constitute a large and necessary market for TBA and evaluated the Goodyear-Atlantic sales commission system in relation to Atlantic's seventeen-state service station TBA market. Atlantic has nearly seven thousand service stations in this territory. As of 1955 Goodyear had signed TBA contracts with 2,183 of the 2,248 Atlantic service stations in the eight-state territory assigned it. As of 1955 Firestone had signed virtually all the 4,698 Atlantic stations in the ten-state area assigned it. Goodyear's TBA sales to Atlantic dealers rose from approximately two and one-half million dollars in 1951 to more than five and one-half million dollars in 1955. Firestone's sales to Atlantic dealers increased from \$3,243,350 in 1951 to \$5,562,936 in 1955. Total Goodyear and Firestone sales under the Atlantic contracts from June, 1950 to June, 1956 was more than \$52,000,000. Atlantic's stations constitute 3.4 per cent of the total number of service stations in the United States and it sells 2.5 per cent of the gasoline sold in the nation.

We believe the foregoing facts adequately demonstrate that a substantial amount of commerce has been affected by Atlantic's contracts with Goodyear and Firestone. These facts also demonstrate that Atlantic has sufficient economic power in the gasoline market to restrain a substantial amount of commerce in the service station TBA market within the territory serviced by Atlantic. Therefore, the Goodyear-Atlantic sales commission system is within the

<sup>5</sup> Of the 1,155 independent Goodyear dealers in Atlantic's marketing area, only 128 were acting as supply points for Atlantic service stations.

"substantiality of economic effect on commerce" test defined in *Northern Pac. Ry. v. United States*, *supra*, and *Standard Oil Co. v. United States*, 337 U. S. 293 (1949). Cf. *Osborn v. Sinclair Refining Co.*, *supra*.

## II.

Goodyear contends that the provision in the Commission's order prohibiting it from entering into sales commission contracts with any oil company is not supported by substantial evidence. Atlantic makes a similar contention that the order is too broad because it prohibits the oil company's participation in a sales commission arrangement with any TBA supplier.

We think the Supreme Court answered petitioners' contentions in *F. T. C. v. Ruberoid Co.*, 343 U. S. 470, 473 (1952), when it said:

Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.

Petitioners' contention that the Commission's findings are inadequate and do not meet the requirements of section 8 of the Administrative Procedure Act, 5 U. S. C. §1007(b), is without merit.

Moreover, we are not persuaded by Atlantic's contention that the hearing examiner, in making his decision, considered evidence outside the record since he heard a similar complaint filed against Firestone and Shell Oil Company;

nor are we persuaded by Goodyear's contention that the finding of the violation against it is based on evidence admitted against Atlantic but struck as to Goodyear. While the examiner received evidence concerning both the Firestone-Atlantic and the Firestone-Shell sales commission contracts, we are satisfied that the findings of both the examiner and the Commission were based on proper and sufficient evidence and that there was no denial of procedural due process.

The Commission's order is affirmed and will be enforced.



**APPENDIX D.**

**ORDER OF THE COURT OF APPEALS.**

UNITED STATES COURT OF APPEALS,  
FOR THE SEVENTH CIRCUIT,  
CHICAGO, ILLINOIS, 60610.

Friday, April 24, 1964.

Before:

HON. ELMER J. SCHNACKENBERG, Circuit Judge,  
HON. LATHAM CASTLE, Circuit Judge,  
HON. LUTHER M. SWYGERT, Circuit Judge.

THE GOODYEAR TIRE & RUBBER COM-  
PANY,

THE ATLANTIC REFINING COMPANY,  
Petitioners,

vs.

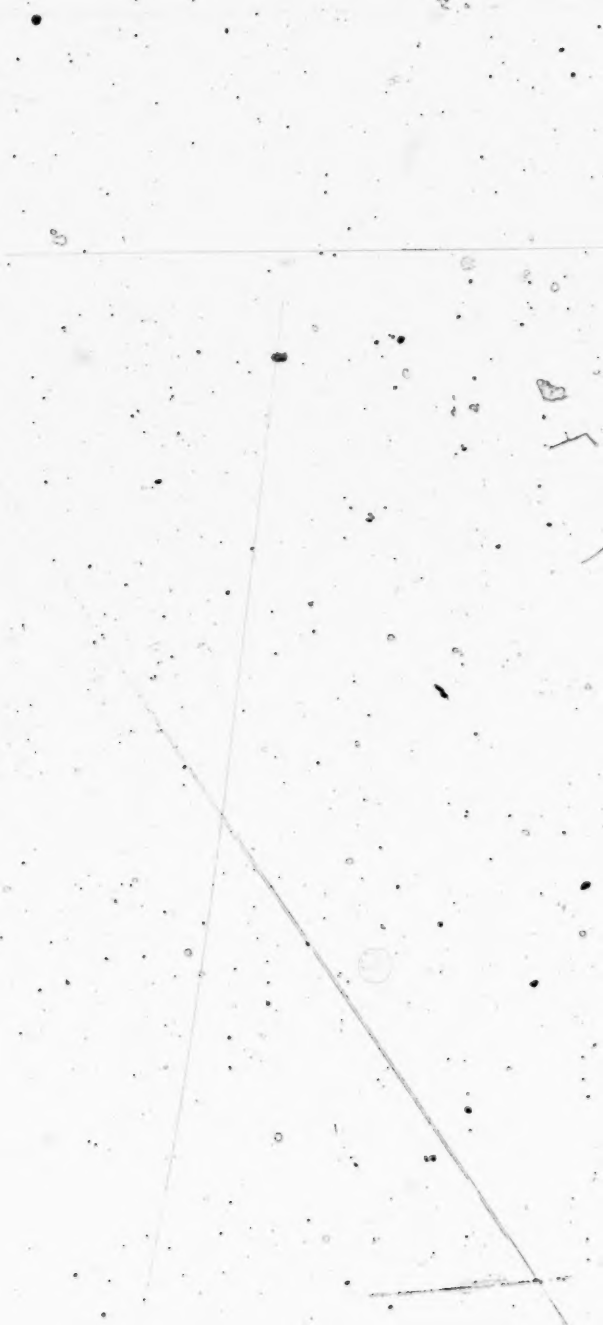
No. 13339, 13340.

FEDERAL TRADE COMMISSION,  
Respondent.

Petitions for  
review of  
an order of  
the Federal  
Trade  
Commission.

This cause came on to be heard on the petitions for review of an order of the Federal Trade Commission and the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the order entered in this cause by the Federal Trade Commission on March 9, 1961, be, and the same is hereby AFFIRMED, and the order will be enforced, in accordance with the opinion of this Court filed this day. Upon presentation an appropriate decree will be entered.



**APPENDIX E.**  
**DECREE OF THE COURT OF APPEALS.**

UNITED STATES COURT OF APPEALS,  
FOR THE SEVENTH CIRCUIT.

THE GOODYEAR TIRE & RUBBER  
COMPANY,

Petitioner,

v.

FEDERAL TRADE COMMISSION,  
Respondent.

No. 13339.

May 20, 1964

Final Decree Affirming and Enforcing  
Order to Cease and Desist

The Goodyear Tire & Rubber Company, a corporation, petitioner herein, having filed in this Court on May 10, 1961, a petition to review and set aside an order to cease and desist issued against it on March 9, 1961, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of The Goodyear Tire & Rubber Company, a corporation, and The Atlantic Refining Company, a corporation, Docket No. 6486;" and a copy of said petition having been served upon respondent; and the respondent having thereafter certified and filed in this Court a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on January 9, 1964, and this Court having rendered its decision on April 24, 1964:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the prayer of the aforesaid petition to set aside the order of the Federal Trade Commission as to the petitioner herein be, and it hereby is, denied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the order to cease and desist of the Federal Trade Commission



be, and it hereby is, affirmed, and that petitioner be, and it hereby is, commanded forthwith to obey said order and to comply therewith.

By the Court.

U. S. C. A.—7th Circuit

FILED

May 20 1964

KENNETH J. CARRICK

Clerk

/s/ ELMER J. SCHNACKENBERG

Elmer J. Schnackenberg, Circuit Judge

/s/ LATHAM CASTLE

Latham Castle, Circuit Judge

/s/ LUTHER M. SWYGERT

Luther M. Swygert, Circuit Judge

Entered: May 20, 1964

A True Copy:

Teste:

/s/ KENNETH J. CARRICK

Clerk of the United States Court of

Appeals for the Seventh Circuit.

[SEAL]